

1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 Case No. 08-13555-jmp  
4 Case No. 08-01420-jmp  
5 - - - - - x  
6 In the Matter of:  
7 LEHMAN BROTHERS HOLDINGS INC., ET AL,.  
8 Debtors.  
9 - - - - - x  
10 In the Matter of:  
11 LEHMAN BROTHERS INC.  
12 Debtor.  
13 - - - - - x  
14 LBHI,  
15 Plaintiff,  
16 v.  
17 JPMORGAN CHASE BANK, N.A.,  
18 Defendant.  
19 - - - - - x  
20  
21 U.S. Bankruptcy Court  
22 One Bowling Green  
23 New York, New York  
24  
25

1 February 13, 2013

2 10:04 AM

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4 B E F O R E :

5 HON JAMES M. PECK

6 U.S. BANKRUPTCY JUDGE

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1 Hearing re: LBHI's Objection to Proofs of Claim Number  
2 14824 and 14826 [ECF No. 30055]

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4 Hearing re: Debtors' Sixty-Seventh Omnibus Objection to  
5 Claims (Value Derivative Claims) [ECF No. 12533]

6  
7 Hearing re: Debtors' Eighty-Fourth Omnibus Objection to  
8 Claims (Value Derivative Claims) [ECF No. 13955]

9  
10 Hearing re: Two Hundred Eighty-Second Omnibus Objection to  
11 Claims (Late Filed Claims) [ECF No. 27374]

12  
13 Hearing re: Joint Motion of Lehman Brothers Holdings Inc.  
14 and Litigation Subcommittee of Creditors' Committee to  
15 Extent Stay to Avoidance Actions and Grant Certain Related  
16 Relief [ECF No. 33322]

17  
18 Hearing re: One Hundred Eighty-Third Omnibus Objection to  
19 Claims (No Liability CMBS Claims) [ECF No. 19407]

20  
21 Hearing re: One Hundred Forty-Third Omnibus Objection to  
22 Claims (Late-Filed Claims) [ECF No. 16856]

23  
24 Hearing re: Three Hundred Twenty-Eighth Omnibus Objection  
25 to Claims (No Liability claims) [ECF No. 29323]

1 Hearing re: LBHI v. JPMorgan Chase Bank, N.A. [Adversary  
2 Proceeding No. 10-03266]

3  
4 Hearing re: Motion of Fidelity National Title Insurance  
5 Company to Compel Compliance with Requirements of Title  
6 Insurance Policies [ECF No. 11513]

7  
8 Hearing re: Motion of Traxis Fund LP and Traxis Emerging  
9 Market Opportunities Fund LP to Compel Debtors to Reissue  
10 Distribution Checks for Allowed Claims [ECF No. 32163]

11  
12 Hearing re: Cardinal Investment Sub I, L.P. and Oak Hill  
13 Strategic Partners, L.P.'s Motion for Limited Intervention  
14 in the Contested Matter Concerning the Trustee's  
15 Determination of Certain Claims of Lehman Brothers Holdings  
16 Inc. and Certain of Its Affiliates [LBI ECF No. 4634]

17  
18 Hearing re: Motion Pursuant to Federal Rule of Bankruptcy  
19 Procedure 9019 for Entry of an Order Approving Settlement  
20 Agreement [LBI ECF No. 5483]

21  
22 Hearing re: Trustee's Motion Pursuant to Section 105(a) of  
23 the Bankruptcy Code and Bankruptcy Rules 3007 and 9016(b)  
24 for Approval of General Creditor Claim (I) Objections  
25 Procedures and (II) Settlement Procedures [LBI ECF no. 5392]

1 Hearing re: Motion of FirstBank Puerto Rico for (1)  
2 Reconsideration, Pursuant to Section 502(j) of the  
3 Bankruptcy Code and Bankruptcy Rule 9024, of the SIPA  
4 Trustee's Denial of FirstBank's Customer claim, and (2)  
5 Limited Intervention, Pursuant to Bankruptcy Rule 7024 and  
6 Local Bankruptcy Rule 9014-1, in the Contested Matter  
7 Concerning the Trustee's Determination of Certain Claims of  
8 Lehman Brothers Holdings Inc. and Certain of Its Affiliates  
9 [LBI ECF No. 5197]

10

11 Hearing re: Motion of Elliott Management Corporation For an  
12 Order, Pursuant to 15 U.S.C. §§ 78fff-1(B), 78fff-2(B) and  
13 78fff-2(C)(1) and 11 U.S.C. § 105(A), (I) Determining the  
14 Method of Distribution on Customer Claims and (II) Directing  
15 an Initial Distribution on Allowed Customer Claims [LBI ECF  
16 No. 5129]

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1 P R O C E E D I N G S

2 THE COURT: Be seated, please. Good morning.  
3 Who's our master of ceremonies today?

4 MR. ISAKOFF: Well, Your Honor, I'm not  
5 necessarily the master of ceremonies for the whole day, but  
6 I'm here for the first matter.

7 Peter Isakoff of Weil, Gotshal representing LBHI  
8 in connection with the large claims filed by Canary Wharf  
9 entities that total \$780 million, it's a status conference.  
10 The claim numbers are 14824 and 14826.

11 We were last here -- last here on January 16th  
12 where we had begun discussions concerning procedures and had  
13 a status conference at that time where Your Honor asked that  
14 we continue the discussions.

15 We have done so, and I'd like to report on that  
16 and state where I think the parties are in disagreement,  
17 which is unfortunately the case, but let me walk through a  
18 little bit as to what happened and then we can see where we  
19 can go from there.

20 THE COURT: Okay. I did take a look at the  
21 submission that Canary Wharf filed of record so I have their  
22 perspective.

23 MR. ISAKOFF: And I'm here today to give you ours,  
24 Your Honor.

25 THE COURT: Fine.

1 MR. ISAKOFF: On January 23 we met by telephone  
2 and they -- we concluded without any -- reminisced anything  
3 except that they very much wanted us to specify what  
4 discovery it was we were seeking, but we endeavored to do  
5 that in a letter of January 29, which was part of the  
6 submission given to Your Honor.

7 Basically what we said is that if we could agree  
8 on the basic parameters of discovery we would agree that we  
9 could do it in phases as they wished to postpone any  
10 discovery relating solely to the amount of damages, if any,  
11 at a later time, and then we outlined what would be the  
12 categories in a document request that expressly would carve  
13 out anything concerning the quantum of damages.

14 We did indicate that we had to reserve the right  
15 to do any necessary follow up based on what we received,  
16 that the tools of discovery would be unlimited in the sense  
17 that maybe we'd want to do interrogatories, maybe we'd want  
18 to do request for admissions. We did not say contrary to  
19 their submission that discovery would be unlimited, just  
20 that the available tools would be the usual ones.

21 The document requests and production would be  
22 followed by fact depositions and then expert reports and  
23 depositions of them, including the Queen's counsel. There  
24 may not be any other experts, we don't know yet.

25 We said that ADR of some sort might be

1 appropriate, but that we were unwilling at least prior to  
2 discovery to determine what would be the appropriate ADR  
3 procedure to follow. In our view it may be that mediation  
4 in particular would be very fruitful, but after we found out  
5 what the factual record would be.

6 They responded on February 1 with an exceedingly  
7 limited scope of discovery. As we read it, and I'm sure  
8 they'll correct me if I'm wrong, they promised to produce  
9 proof that the Lehman subsidiary stopped paying rent at the  
10 end of March 2010. I don't believe we even asked for that  
11 and I don't know that there'd be any contest about that.

12 There was an exchange of emails between counsel  
13 for Canary Wharf and for LBHI on December of 2010, around  
14 the time of the forfeiture letter, and they offered to  
15 produce the exchange of all emails between counsel for the  
16 parties, which we undoubtedly already have. Then they  
17 wanted to take depositions of the two counsel in the email  
18 exchange, and that was at -- they submitted a short  
19 stipulation of a few of the relevant facts.

20 And on the 5th we responded that, you know, given  
21 the size of these claims and given the amounts in dispute  
22 and the stakes for LBHI and its creditors, that we could not  
23 agree to any such truncated discovery, that we --

24 THE COURT: Can you explain that to me? Because  
25 one of the obvious areas of disagreement between the parties

1 at this stage is whether this is a big deal leading up to a  
2 limited evidentiary hearing in which two solicitors provide  
3 their opinions as to applicable English law or whether or  
4 not there is a targeted more limited deal in anticipation of  
5 that hearing.

6 And what I gather is that the debtors' perspective  
7 is that there should be very broad discovery leading up to  
8 that hearing, and it is Canary Wharf's position, if I'm  
9 understanding it correctly, that they're inclined to be more  
10 targeted. Am I right on that?

11 MR. ISAKOFF: I would disagree certainly with the  
12 view that what they're looking for is something targeted. I  
13 think what they're doing is putting the target behind a  
14 black box and not letting us into it.

15 I've just described the discovery that they say  
16 they'd be willing to give us and it just is essentially  
17 nothing.

18 What we are looking for -- and I can go through it  
19 chapter and verse on this, Your Honor, go through the  
20 categories in our January 29 letter and explain why we need  
21 it --

22 THE COURT: We can -- we can do that if necessary,  
23 but maybe before we get to that it would be helpful to  
24 understand what we're really talking about.

25 MR. ISAKOFF: Okay. And I will do that.

1 THE COURT: Because it's my understanding that  
2 we're dealing with what is in effect a bifurcated process in  
3 which damage issues will be put to one side and in effect  
4 it's a bifurcated trial as to liability with damages to  
5 follow only if there is liability. And as to the liability  
6 phase the parties agree that the issue is totally driven by  
7 how English law is interpreted here and how it applies to  
8 the documents.

9 MR. ISAKOFF: Well, I would amend that, Your  
10 Honor, by saying that how it applies to the documents may  
11 very well depend on a variety of facts, and I'd like to  
12 explain a little bit why.

13 THE COURT: Okay.

14 MR. ISAKOFF: All right.

15 THE COURT: But just if you'll bear with me. What  
16 I'm trying to figure out, and I think you're about to tell  
17 me, is how broader-based discovery plays into that inasmuch  
18 as my understanding is that the real legal issue is driven  
19 by what some solicitors say, and in my simplistic way of  
20 looking at this it's a little bit like expert discovery with  
21 expert reports and depositions of the expert and with the  
22 discovery being perhaps limited to what the experts relied  
23 upon, took into consideration, and how they informed  
24 themselves to the point that they're able to express an  
25 opinion.

1           And it seems to me -- and I may be overly narrow  
2           in my view and I may appear to be -- prepared to be  
3           influenced by your comments -- but it seems to me that  
4           that's what we're talking about here, and I think you're  
5           thinking that this is a bigger deal.

6           MR. ISAKOFF: Well, first of all what the QCs have  
7           said is based upon what was available to them, and of course  
8           at some time it would be appropriate to depose them and  
9           perhaps have them testify before Your Honor as to their  
10          opinions and what they base it on, but the record is not  
11          closed, the record has not even begun to open, and there are  
12          a number of things which I can go through here --

13          THE COURT: Well, why don't you --

14          MR. ISAKOFF: -- which could very well have been  
15          influenced on what they --

16          THE COURT: -- why don't you tell me what it is  
17          that you think you need in order to prepare for this hearing  
18          and I'll hear from Canary Wharf's counsel as to whether they  
19          agree or disagree with that.

20          It's highly unusual in this case for experienced  
21          and competent attorneys such as are involved here not to be  
22          able to reconcile a discovery plan in anticipation of what I  
23          think everybody recognizes is a hearing that has a narrow  
24          focus or at least a liability only focus, which will be  
25          driven by incredibly my interpretation of English law

1 documents and my interpretation and application of English  
2 law to those documents. It's one of the reasons why I  
3 thought London-based arbitration might not be a bad approach  
4 here.

5 MR. ISAKOFF: And perhaps one day once we've seen  
6 what the record is and what's in their files we'll come to  
7 the same conclusion, Your Honor, but let me just talk a  
8 little bit about what's involved here and why it is we need  
9 discovery.

10 First of all there are two basic groups of issues.  
11 One issue concerns whether the settlement or the agreement  
12 reached between Canary Wharf and LBL to effectively waive  
13 Canary Wharf's administration expense claim of about  
14 30 million pounds in exchange for a payment of one and a  
15 half million pounds from LBL. And the as between the two  
16 QCs is whether or not (a), this is a guarantee, which is  
17 what we said, or an indemnity, which is what they say, and  
18 then whether this was a material alteration of the -- LBHI's  
19 risk.

20 Their position is, well, the QCs don't rely on  
21 parole evidence therefore why do you need it?

22 Now, we've sought, and we do this in our January  
23 29 letter, the negotiation documents leading up to the lease  
24 and the guarantee that's part of lease, that's Schedule 4,  
25 including drafts, notes, and communications, and so forth.

1 And why are we seeking that parole evidence?

2 Because it may be that although we take the position that --  
3 and our QC does -- that this guarantee is a guarantee not an  
4 indemnity, and they take the position based on the contract  
5 that it's an indemnity not a guarantee, that Your Honor may  
6 feel that there's an ambiguity as to which parole evidence  
7 would be admissible, similar to what we did in the Bank of  
8 America case where we had -- you know, where the parole  
9 evidence turns out to be very informative. So that's those  
10 categories, that's one and two.

11 Category three is documents that they contend  
12 support or that they're going to use in support of their  
13 claims. That's just a question of, you know, getting notice  
14 of what it is that they're planning on using.

15 Then we get into the JPMorgan transaction, and  
16 that's a little bit different issue from the guarantee  
17 versus indemnity. Because if we're right that it's a  
18 guarantee and we're right that this deal that they made  
19 vitiated the guarantee completely then the case is over, but  
20 we're not litigating it -- that claim first and then the  
21 others, we're litigating them all at once.

22 And the next one really has to do with their claim  
23 that an email exchange between one of my partners and  
24 somebody at Sullivan & Cromwell was an anticipatory  
25 repudiation of an obligation to take a substitute lease that

1 an email exchange took place before the forfeiture, whereas  
2 the lease document and the guarantee document. Section 7 of  
3 the guarantee says that one of two things happens. If  
4 there's a forfeiture, which there was on December 10th,  
5 either LBHI is liable for rent until a new tenant comes in  
6 -- which happened in this case 10 days later -- or 180 days,  
7 whichever is earlier. So we're saying we're only liable for  
8 ten days rent beginning December 10th to December 20th.

9 They say but wait a minute, Richard Cransnell (ph)  
10 that, well, we're not inclined to take the lease. Okay?  
11 But they hadn't tendered it and their -- and so they didn't  
12 comply with the obligation. In other words they could have  
13 after forfeiture gone to LBHI and said, you take a  
14 substitute lease. They never did that.

15 They're relying on this email exchange. And what  
16 we're saying is the following. There's something funny  
17 going on. Because this is a transaction for I believe it  
18 was a million square feet of space between Canary Wharf and  
19 JPMorgan. We are told, although we have never seen it, that  
20 there was a memorandum of understanding in August of 2010,  
21 four months before this email exchange. They never told us  
22 about it, we've never seen it. They didn't consult us  
23 concerning the forfeiture letter transaction, they -- we  
24 learned almost through the grapevine that there's some  
25 transaction going on while we're in the midst of trying to

1 do settlement discussions with them. We don't learn about  
2 it from them. And they turn to us and say, well, if you  
3 want to see the JPMorgan transaction you tell us that you're  
4 not interested in taking the lease.

5 And why do they do that? Is it is it because  
6 JPMorgan insists that there be no delay? Is it because they  
7 don't want to have to comply with the automatic stay? Is it  
8 because if they tender the lease to us maybe we're going to  
9 see with the JP Morgan transaction maybe we can do better  
10 than simply declining it and take it and maybe do our own  
11 deal? We weren't given any of those opportunities.

12 What they did was that, you know, quickly put  
13 pressure, if we want to see this transaction to say okay we  
14 don't really want the lease and then try to use that to have  
15 their cake and eat it to. They do their transaction, they  
16 try to stick us as if they had complied with the transaction  
17 documents.

18 Now, we think we're entitled to see not just their  
19 internal communications, which are probably privileged, but  
20 we would like to see their communications between them and  
21 JPMorgan and see whether this was a concerted strategy, at  
22 least on Canary Wharf's part. If so that may suggest that  
23 the basis for their anticipatory repudiation is not in good  
24 faith, that they're not entitled to some extraordinary  
25 relief from not having complied with the agreement, which is

1 what they did. They did not comply with it, and they're  
2 seeking to use this email exchange as a substitute. And we  
3 think we're entitled to explore the answers to these  
4 questions.

5 We don't think that it's a tremendous amount of  
6 discovery, we don't think it's wide-ranging. How long it  
7 takes to do it is frankly dependent on them. We would serve  
8 a discovery request if Your Honor permitted this week. I  
9 suspect we're going to wind up here in disputes based upon  
10 the positions that they've taken in their letters and Your  
11 Honor may have to resolve them.

12 THE COURT: You know how I love discovery  
13 disputes.

14 MR. ISAKOFF: I know you don't, Your Honor, and I  
15 would love to avoid it, but where I'm being told that what  
16 we'll give you is the exchanges that you already have  
17 between counsel, you know, and no discovery concerning  
18 things that I think the QCs would have to explain and take  
19 into account in a more full way in doing an opinion that's  
20 not preliminary but it's based upon an evidentiary record.  
21 That's what we're looking for, Your Honor.

22 THE COURT: Let me -- let me hear from counsel for  
23 Canary Wharf, recognizing that I have a pretty good  
24 understanding of their position as a result of what I read.  
25 I now have a pretty good understanding of your position as a

1 result of what you've said.

2 MR. ISAKOFF: Thank you, Your Honor.

3 THE COURT: And I have an inclination, which I'm  
4 going to mention even before I hear from Canary Wharf's  
5 counsel, which is this status report turns out to be more in  
6 the nature of a discovery dispute already, and we have a  
7 fairly full courtroom and we have a fairly congested morning  
8 calendar as well as a 2 o'clock calendar.

9 It occurs to me that the parties still need to do  
10 more work to -- excuse me -- narrow the issues, and --  
11 excuse me -- I'm going to need to excuse myself and have  
12 some water. In fact that's what I'm going to do. I'm going  
13 to take a minute, nobody move, nobody get up.

14 (Laughter)

15 THE COURT: I'm going to go in there, I'm going to  
16 come back.

17 (Recess at 10:23 a.m.)

18 THE COURT: I will pick up not exactly where I  
19 left off.

20 It seems to me that more time needs to be spent  
21 seeking accommodation with respect to scope. To the extent  
22 that you achieve that you should endeavor to develop an  
23 agreed order. To the extent you are unable to achieve that  
24 we should have a discovery conference. It does not need to  
25 be on an omnibus hearing date, and it probably should be in

1 chambers rather than just on the phone. That will give the  
2 parties an opportunity, to the extent they can't work things  
3 out, to provide me with a clearer and more detailed  
4 understanding as to just exactly why you can't get along on  
5 this subject.

6 I understand from what you're saying, Mr. Isakoff,  
7 that from Lehman's perspective you're not trying to expand  
8 the scope but you are trying to understand more about  
9 conduct and motivation. I understand that from Canary  
10 Wharf's perspective they view this as a fairly  
11 straightforward question of applying law to facts. I  
12 suspect that's what the problem lies.

13 MR. ISAKOFF: I suspect so too, Your Honor, and  
14 certainly we would endeavor to try to reach agreement and to  
15 limit discovery to whatever it is that we feel is essential.

16 THE COURT: Okay. I'm not trying to squelch  
17 comments from Canary Wharf's counsel, so this is an  
18 opportunity for counsel to be heard.

19 MR. LEEUW: Thank you very much, Your Honor. Marc  
20 De Leeuw from Sullivan & Cromwell, counsel to Canary Wharf.

21 Your Honor, I appreciate your guidance at the end  
22 of Mr. Isakoff's comments, and we'll obviously follow your  
23 direction.

24 If I could I'd like to just give a little bit of  
25 an overview of why I think -- I think Your Honor's

1 observation of the issue that's separating the parties is  
2 absolutely correct and then give us -- give just a little  
3 bit of a general explanation of our position on this, which  
4 I think Your Honor now understands from having read our  
5 submission.

6 I think Your Honor's observation that what's going  
7 on here for the liability phase, for the evidentiary hearing  
8 where the two Queen's counsel would testify is absolutely  
9 right. It's really a question of interpretation of  
10 documents, specifically agreements, the LBL agreement and  
11 the indemnity agreement, which is attached to the lease, and  
12 the application of English law principals to those  
13 documents. And in fact that's actually what the two Queen's  
14 counsels did. Both of them rendered opinions on liability  
15 solely by reference to those documents and to those English  
16 law principals.

17 THE COURT: But here's the problem. This would be  
18 true even if we were dealing with the application of New  
19 York law. The fact that two reputable and well-informed  
20 solicitors review the same documents and come to opposite  
21 legal conclusions suggests that somebody is wrong, that  
22 somebody is clearly wrong. And that raises a question as to  
23 how that could be. And in a setting like that one might  
24 need to drill down a little bit as to what led to those  
25 curiously contrary positions.

1 MR. LEEUW: And, Your Honor, I think Your Honor  
2 mentioned drilling down with respect to potentially  
3 depositions of the two Queen's counsel. That's really not I  
4 think the primary debate between the parties here. If  
5 that's the issue of course we can speak about that question,  
6 and I understand that, but the question about whether the  
7 two solicitors have a difference of opinion about the law is  
8 really -- you're right, no different than if Mr. Isakoff and  
9 I had a disagreement about New York law. We'd both be  
10 putting in briefs, we'd both be citing different cases or  
11 statutes or applies law to specify documents. That wouldn't  
12 mean that it's a question that needs discovery, it wouldn't  
13 mean that somebody, Your Honor in this case, would be  
14 deciding what is the right view of New York law in that  
15 circumstance. And that's really what we have.

16 To give just an example Mr. Isakoff said there's  
17 really sort of two buckets here. He said the first bucket  
18 is whether there -- whether the releases in the agreement  
19 between Canary Wharf and LBL discharges LBHI of its  
20 obligations, and it says there's a whole bunch of buckets.  
21 And then it says, well, maybe there's some discovery.

22 That's exactly the issue that when we were here  
23 last month Mr. Isakoff stood up before Your Honor and Your  
24 Honor said, what can we have an oral argument on without the  
25 need for any discovery? And Mr. Isakoff said explicitly,

1 that issue, the issue that he just said a moment ago  
2 requires discovery requires no discovery because the facts  
3 are effectively undisputed, it is just an issue of English  
4 law. That's exactly what he said. It's on page 12 of the  
5 transcript.

6 Lehman has argued -- the debtors have argued that  
7 these are issues -- that issue could be resolved by Your  
8 Honor, but Your Honor, we're mindful of your guidance.

9 I think the real dispute between the parties  
10 that's been framed in these letters is exactly what Your  
11 Honor pointed out. There's a narrow dispute here about the  
12 application of documents to English law.

13 What we did in our submission was specify what are  
14 the issue ins dispute. We numbered them as three,  
15 Mr. Isakoff had grouped two together, but three issues,  
16 three issues of English law. They're issues of English law  
17 that can be resolved without any discovery. Both Queen's  
18 counsel have rendered their opinions on that by reference to  
19 the documents and to English law, and neither one said in  
20 any way, shape, or form that there were some facts that were  
21 necessary, some more information that was necessary to  
22 render an opinion on those three liability issues.

23 On the damages issues of course there may be facts  
24 and there may be discovery, that's a different question.

25 And so what we tried to do both in our letter to

1 Mr. Isakoff and in our submission was identify what those  
2 three issues are and then specify what documents, what  
3 discovery might be needed. We don't think really any is  
4 necessary, and I think given Mr. Isakoff's concession as to  
5 the first point that really doesn't -- it's probably not  
6 even disputed, then much of the discovery doesn't, if any,  
7 needs to be done. These are really questions of English  
8 law.

9 So we think the real question is when you go  
10 through each issue, and we've gone through the three issues  
11 in our submission, each one is a matter of English law, each  
12 one -- on each one the two Queen's counsels rendered their  
13 opinion as a strict matter of English law, and then each one  
14 of them say no further information is necessary.

15 So we think that's the issue that we should have a  
16 liability phase hearing on. And what we've suggested to  
17 Your Honor is that we could do a relatively short period of  
18 discovery, we suggested 60 days. We could produce the  
19 documents that are relevant to those very narrow issues in  
20 which LBHI says its needs discovery on those three  
21 identified issues, have depositions of the two people that  
22 are the source of the anticipatory repudiation, and then  
23 have submissions and a hearing with Your Honor. And we had  
24 suggested early June, Your Honor, but obviously it'll be  
25 subject to Your Honor's schedule.

1 THE COURT: Okay. I was hoping to suppress that  
2 whole argument, but I guess I failed.

3 MR. LEEUW: I apologize, Your Honor, for going too  
4 far.

5 THE COURT: And I was giving you the chance to  
6 express Your Honor because you gave me your whole argument.  
7 And what I was really encouraging was that a less polarized  
8 approach to the discovery dispute in the context of a meet  
9 and confer session focused upon some compromise would be  
10 useful. Because this isn't going to be all your way and  
11 it's not going to be all Lehman's way, it's going to be my  
12 way.

13 MR. LEEUW: We understand that, Your Honor.

14 THE COURT: And I would like my way to be  
15 appropriate to allow me to have the benefit of a fully  
16 informed record with respect to issues that the parties  
17 themselves may be familiar with, but I'm not familiar with  
18 at all except from what I've heard in the last couple  
19 hearings.

20 The fact that we are dealing with a big ticket  
21 dispute in reference to a trophy piece of London real estate  
22 that has a storied history in bankruptcy, completely  
23 unrelated to Lehman, makes me curious as to why the parties  
24 are jockeying for a position preemptively with respect to  
25 this. So inquiring minds want to know.

1 That suggests that I will be more inclined in the  
2 event of a dispute to be liberal rather than restrictive  
3 with respect to discovery, so long as the discovery is in  
4 fact relevant to the legal issues in dispute.

5 And so in that spirit I suggest that you proceed  
6 to try to work this out with the understanding that if you  
7 can't you shouldn't continue fruitlessly disagreeing with  
8 one another, you should contact my chambers and schedule an  
9 in-person settlement conference with respect to the  
10 discovery.

11 I believe that it is premature to set a hearing  
12 date until after we resolve what the discovery schedule will  
13 look like.

14 Now, having said what I said, I would also like to  
15 make clear, I do not want this discovery program to be  
16 unduly extensive or burdensome. I would like it to be  
17 focused.

18 With that I think I've given you each a little bit  
19 of something, and I hope you're successful in working this  
20 out.

21 MR. ISAKOFF: Your Honor, could I have just one  
22 word?

23 THE COURT: Sure.

24 MR. ISAKOFF: The comment that the first issue  
25 concerning whether it's a guarantee or an indemnity that I

1 made some kind of concession that there are no relevant  
2 discovery or facts to be discovered. If we were to prevail  
3 on the papers (indiscernible - 00:30:25) summary judgment I  
4 would say, yes; however, as we've said in our reply papers  
5 and as I thought I made clear, that if we were not  
6 successful then we would need to take discovery.

7 Now maybe then in discussions we can decide that  
8 with respect to that issue that perhaps discovery can be --  
9 can await a ruling, and if Your Honor is concerned that the  
10 issue is ambiguous and at that point might benefit from  
11 parole evidence maybe we'd take discovery at that point.  
12 It's not the efficient way to go, but it is a possibility.

13 THE COURT: That's exactly how we proceeded in the  
14 Bank of America litigation. My recollection is that we were  
15 having summary judgment argument and I determined that I  
16 wanted to hear from witnesses.

17 MR. ISAKOFF: Right. And at that point -- by that  
18 time discovery -- fact discovery was full and there had been  
19 complete document discovery and extensive depositions of all  
20 of the relevant witnesses, and that's, you know, obviously  
21 on the focus matters here that we're looking for the  
22 opportunity to develop the evidentiary record.

23 Thank you.

24 THE COURT: Okay. Nobody is going to win on the  
25 basis of the discovery protocol. You're going to win on the

1 merits or lose on the merits. So go forth and be  
2 productive.

3 (Laughter)

4 MR. ISAKOFF: Thank you, Your Honor.

5 MR. LEEUW: Thank you, Your Honor.

6 MR. HORWITZ: Good morning, Your Honor, Maurice  
7 Horwitz, Weil, Gotshal & Manges on behalf of Lehman Brothers  
8 Holdings Inc. and certain of its affiliates.

9 We have now three items that are uncontested on  
10 this morning's agenda that we'll try to go through quickly  
11 because it is a busy morning.

12 The first two items are related. The debtors'  
13 sixty-seventh omnibus objection to claims and the debtors'  
14 eighty-fourth omnibus objection to claims. Both were  
15 objections seeking to reduce the amount of certain  
16 derivative claims -- derivative-based claims filed against  
17 the debtors.

18 Four claims -- as to four claims, two on the  
19 sixty-seventh and two on the eighty-fourth omnibus objection  
20 the responses filed by SPC Group, LLC have been resolved,  
21 the allowed amounts that would be on the attached exhibit to  
22 these two orders have been modified. We have black lines of  
23 those exhibits to provide to the Court and we have  
24 supplemental orders that would allow these two objections  
25 with respect to these four claims, which we would request

1 entry of after this hearing.

2 THE COURT: Okay. It's unopposed, it's  
3 consensual, and it's approved.

4 MR. HORWITZ: The next item is the two hundred and  
5 eighty-second omnibus objection to claims. This claim was  
6 -- this objection was filed with respect to claims that were  
7 filed after the bar date in these cases.

8 One response to that objection, the response of  
9 Piguet Galland & Cie has been resolved. The claimant has  
10 decided not to prosecute its response to the objection.  
11 That claim was filed on March 16th, 2012, long after the bar  
12 date, and the claimant has agreed to allow this order to be  
13 terminated expunging claim number -- claim numbers 68053 and  
14 68054.

15 We have a supplemental order to provide to the  
16 Court.

17 THE COURT: Fine.

18 MR. HORWITZ: And now I'll turn the podium to my  
19 colleague --

20 THE COURT: Okay.

21 MR. HORWITZ: -- Jacqueline Marcus.

22 THE COURT: Just so the record is clear and I said  
23 more than fine, the claim of this French enterprise that I  
24 can't response, claim under 68053 and 68054 are expunged on  
25 an uncontested basis.

1 MR. HORWITZ: Thank you, Your Honor.

2 MS. MARCUS: Good morning, Your Honor, Jacqueline  
3 Marcus of Weil, Gotshal & Manges for the Lehman estates.

4 Item number 6 on the agenda is the joint motion of  
5 Lehman Brothers Holdings Inc. and the litigation  
6 subcommittee pursuant to Section 105 of the Bankruptcy Code  
7 and Bankruptcy Rule 7004(a)(1) to extend the stay of the  
8 avoidance actions and grant certain relief.

9 Pursuant to this motion, Your Honor, the debtors  
10 seek an extension of the order staying avoidance actions  
11 which would have expired on January 20th but for the entry  
12 of a bridge order as well as a six-month extension of the  
13 time for serving the second amended complaint upon the  
14 defendants in the distributed action.

15 As the Court is aware there were in effect two  
16 different objection deadlines with respect to this motion.  
17 January 9th for those who were served with the motion in a  
18 timely fashion, and January 23rd for the defendants in what  
19 we refer to as the distributed action.

20 As reflected on the agenda only one objection to  
21 the motion was filed by Nationwide Life Insurance Company  
22 and Nationwide Mutual Life Insurance Company, both of which  
23 are defendants in the distributed action.

24 As I have at each of the prior hearings seeking to  
25 extend the stay I'd like to start by reporting on the

1 benefits that the debts have realized from the ADR process  
2 and the stay.

3 As indicated in the thirty-eighth status report  
4 filed on January 16th by my partner, Peter Gruenberger, as a  
5 result of mediation the debtors have achieved settlements of  
6 238 ADR matters involving 333 counterparties generating in  
7 excess of almost \$1.4 billion for the estates.

8 By way of comparison that means that an additional  
9 32 ADR matters with an additional 105 counterparties have  
10 been resolved before we were last before you in July seeking  
11 the prior extension.

12 Another measure of success is that 91 out of the  
13 96 ADR matters that have reached the mediation stage have  
14 been settled. As indicated in Mr. Gruenberger's letter,  
15 another five mediations are scheduled to commence between  
16 today and mid April.

17 In addition, Your Honor, we have received  
18 successes in the derivatives arena outside of the ADR  
19 process.

20 Your Honor will recall that at prior hearings to  
21 extend the stay, among the few objectors, were the  
22 liquidators for LB Australia. Most recently in July they  
23 argued that the stay should not be permitted to expire --  
24 should not be extended -- excuse me -- because the estates  
25 were not making enough progress fast enough to justify the

1 continuation of the stay.

2 At that time I reported to the Court that  
3 settlement discussions were settled and we were hopeful that  
4 those discussions would result in a consensual resolution.

5 As indicated in the motion and in our reply the  
6 estates have reached a settlement with eight classes of  
7 Belmont noteholders. Those agreements have now been fully  
8 executed and in the process of being fully implemented.  
9 Thus the Court's decision in July to extend the stay  
10 facilitated the resolution of one of the most contentious  
11 disputes in these cases.

12 Another notable success accomplished since the  
13 July hearing is the settlement entered into with Canadian  
14 Imperil Bank of Commerce, pursuant to which LBSF realized a  
15 recovery of \$149.5 million and CIBC was dismissed from the  
16 distributed action.

17 Outside of the derivatives arena since July we  
18 have resolved through settlement or withdrawal 21 avoidance  
19 actions and tolled avoidance claims against vendors and  
20 other third parties. There are 16 avoidance actions left to  
21 be resolved as well as many potential defendants who are  
22 parties to tolling agreements.

23 Most recently the avoidance action against  
24 Standard Chartered has been settled by stipulation, an order  
25 that was approved by the Court last week. Under that

1 settlement LCPI has been paid more than \$143 million. The  
2 adversary proceeding will be dismissed in a matter of days.

3 That outstanding result was accomplished based  
4 upon the filing of the complaint and the settlement  
5 discussions that resulted from the filing of the complaint.  
6 There was no formal discovery conducted, no motion practice,  
7 and no strain on the Court's resources.

8 As we speak, Your Honor, we're finalizing another  
9 settlement with a party who's a subject to a tolling  
10 agreement on another large matter and we expect to have that  
11 done win the next few days.

12 In sum, Your Honor, there has been a substantial  
13 amount of progress.

14 Your Honor will no doubt recall that back in July  
15 you asked me to quote, "Provide some guidance as to the  
16 likely duration of this process and when it comes to an  
17 end." That was at page 20 of the transcript.

18 THE COURT: Sounds like something I might say.

19 MS. MARCUS: I recall that I said it was very  
20 difficult to predict. I noted that Mr. Gruenberger's  
21 monthly letters might be a good barometer for whether the  
22 ADR process is continuing to be effective, and I stated,  
23 quote, "There will be a point at which Mr. Gruenberger's  
24 monthly letters will show or won't show continued progress."

25 I expect that Your Honor will ask me the same

1 question today. As the foregoing status report demonstrates  
2 we are still at a point where the continuation of the stay  
3 is generating substantial proceeds for ultimate  
4 distributions to creditors, therefore we have not yet  
5 reached the point where the stay should be terminated.

6 The relief that the estates and litigation  
7 subcommittee seek is warranted under Section 105 of the  
8 Bankruptcy Code due to the number and complexity of the  
9 avoidance actions, the lack of prejudice to any of the  
10 avoidance action defendants, and the progress achieved to  
11 date.

12 The debtors therefore seek a further six-month  
13 extension of the stay to enable them to continue to build on  
14 their successes and to resolve pending matters while  
15 minimizing the time and expense expended by the Chapter 11  
16 estates and the avoidance action defendants as well as the  
17 burden on the Court that would result if the stay were to  
18 expire.

19 Turning to the objection, Your Honor, the proposed  
20 extension of the stay would affect several hundred parties,  
21 yet the Nationwide parties have filed the only objection to  
22 the motion.

23 The Nationwide objection does not contest the  
24 extension of the service deadline, therefore I'll treat that  
25 portion of the relief requested as unopposed.

1           The Nationwide parties request what they describe  
2           as a limited carve out from the stay. In effect, however,  
3           they seek a determination that the stay doesn't apply to  
4           them at all. They seek to conduct discovery of the Chapter  
5           11 estates that addresses an alleged statute of limitations  
6           argument that they have in connection with the amendment of  
7           the first amended complaint in the distributed action. This  
8           is not a minor procedural matter, Your Honor, it's an  
9           important substantive issue.

10           The discovery that the Nationwide parties seek  
11           will be expensive and time consuming and may lead to a  
12           parade of other avoidance action defendants seeking to  
13           commence discovery as well.

14           In addition the Nationwide parties seek  
15           authorization to file a motion to dismiss after completion  
16           of our discovery yet, another encroachment of a stay.

17           In some respects the objection is similar to the  
18           objection filed by U.S. Bank to the prior request for an  
19           extension of the stay. At that time U.S. Bank sought a  
20           determination from the Court regarding the applicable  
21           default rate of interest. The Court overruled the objection  
22           and found as follows, quote:

23           "U.S. Bank seems to be making a substantive  
24           request in the guise of an objection to the extension of the  
25           stay. What happens with interest is a matter to be decided

1 at some point in the future either on a case by case basis  
2 as a result of negotiated compromises that are not presently  
3 before the Court or as a result of litigation that may one  
4 day determine the appropriate rate of interest."

5 That was at the transcript at page 37.

6 The same is true of the statute of limitations  
7 argument raised by the Nationwide parties. This is not the  
8 time or the appropriate procedural context in which to  
9 determine those issues.

10 In determining whether to sustain the objection  
11 the Court should take into account more than simply the  
12 dispute between the estates and the Nationwide parties.  
13 Instead it should take into account the impact that the  
14 relief sought by the Nationwide parties would have on the  
15 cases and the estate's ability to effectively resolve the  
16 numerous pending as well as potential causes of action.

17 THE COURT: Let me break in and ask you this  
18 question though.

19 MS. MARCUS: Sure.

20 THE COURT: Because in a sense I'm glad Nationwide  
21 brought this objection. It allows us to more thoughtfully  
22 assess what the stay is doing and the impact of the stay on  
23 parties, some of who might just have decided not to bother  
24 to raise any question about it.

25 The fact that Nationwide has Done this alone

1 doesn't necessarily mean that Nationwide is by itself in  
2 terms of feeling that the stay is potentially detrimental.

3 The question I have is this. If there is a party  
4 like Nationwide that believes mediation and ADR as to it  
5 can't be useful because they have what they believe to be a  
6 dispositive exit from the case, based upon the statute of  
7 limitations or some other dispositive exit, is it unjust to  
8 keep them in abeyance just because from a case management  
9 perspective it is a good thing for the entire portfolio of  
10 litigation to be stayed?

11 MS. MARCUS: Well, I guess I would -- I know Your  
12 Honor is a big proponent of the ADR process, and I guess I  
13 would question whether --

14 THE COURT: I am a huge proponent of the ADR  
15 process.

16 MS. MARCUS: Sorry for the understatement. I  
17 guess --

18 THE COURT: I think the ADR process is one of the  
19 most extraordinarily successful aspect of case  
20 administration in this massive case, and the success  
21 reported in Mr. Gruenberger's most recent letter that you  
22 quoted from speaks for itself.

23 MS. MARCUS: So I guess you've convinced me of the  
24 importance of the mediation ADR process as well, Your Honor,  
25 over the last four years.

1           The fact that a party believes it cannot benefit  
2           or that mediation can't be useful because they have a  
3           dispositive exit I would expect that that argument would be  
4           used and raised in the mediation itself so that that party  
5           still has the forum in which to assert that claim, they're  
6           simply asserting it to the mediator and trying to extract a  
7           favorable settlement as a result of those arguments.

8           THE COURT: I guess the difference is that for a  
9           party that in good faith believes that the statute has run  
10          and that as a result there is no legal basis to find any  
11          liability would assert in mediation those defenses, but the  
12          mediation process itself just by its very nature tends to  
13          strongly encourage compromise of otherwise ridged legal  
14          positions thereby resulting in -- not that it's a bad thing  
15          for the debtor, it's a good thing for the debtor -- a  
16          payment notwithstanding a firmly held view that for payment  
17          should be made.

18          MS. MARCUS: Right. But when you take into  
19          account the possibility of agreeing to some payment versus  
20          the cost (indiscernible - 00:45:54) to proceeding with  
21          litigation I don't think that the --

22          THE COURT: Right.

23          MS. MARCUS: -- counterparty --

24          THE COURT: It's the avoided cross theory.

25          MS. MARCUS: That's correct, Your Honor.

1 In addition the Nationwide parties, while they --  
2 I think the term they use in their objection was high  
3 prejudice. They didn't actually state in their objection  
4 what that prejudice might be.

5 Our view is that there is no prejudice, that the  
6 litigation is stayed as to all defendants, and therefore  
7 there's no harm to the Nationwide parties that needs to be  
8 addressed by the Court.

9 For all of the foregoing reason, Your Honor, we  
10 request that the Court extend the stay, we have a form of  
11 proposed order which differs slightly from the order that we  
12 filed would the motion, because during the period since we  
13 filed the motion two of the avoidance actions have actually  
14 been dismissed, so we have -- the exhibit is somewhat  
15 different.

16 THE COURT: Okay. I'll hear from Nationwide.

17 MR. LINDSMITH: Good morning, Your Honor, my name  
18 is Quintin Lindsmith, I'm with the firm of Bricker & Eckler  
19 in Columbus, and I am mindful that we're the only party  
20 that's objected, Your Honor, and I don't mean to come here  
21 disrespectful of the process -- of the ADR process.

22 When I did come here last July for the hearing  
23 where debtor argued for a six-month stay at that time they  
24 told the Court they wanted a reasonable and modest extension  
25 of the stay, and I heard the same words that counsel read

1 back of what His Honor said about the extension of the stay.  
2 At that time they said the stay is to negotiate settlements.

3 Now, I'm here only in the adversary proceeding,  
4 which is the distributed action, number 3547, and I have no  
5 argument with any extended stay anywhere else in the case,  
6 Your Honor, but I'm just focusing on that adversary  
7 proceeding, and even more so just on my clients.

8 As I look at their pleadings they indicated in the  
9 adversary proceeding, the distributed action, there have  
10 been three settlements. Now, I know one is a very big  
11 settlement with Canadian Bank, but out of 263 defendants  
12 that's three settlements, and they said last time we need  
13 six months to start the settlement process and to finish the  
14 execution of service of process.

15 Your Honor, they only asked for six more months,  
16 but if they want six months to settlement with 263 parties  
17 it's not six months, this is a stalking horse for another  
18 year at least.

19 And I would submit to the Court that to allow a  
20 stay of a case of this magnitude for three and a half years  
21 is very unusual. I won't say more than that, it's unusual,  
22 Your Honor.

23 In my case, when we talk about we've been told by  
24 Lehman that the target on our back is \$16 million. Now, I  
25 know in the scheme of this bankruptcy that may not be a lot

1 of money, but it is in Columbus and we're being sued for  
2 \$16 million.

3 The prejudice is they've been allowed to erect a  
4 sword to our chest and we're not allowed to erect a shield.  
5 That's the prejudice. And the more this goes on the more we  
6 only have a sword at us and no shield.

7 THE COURT: I'm sorry, what was the prejudice?

8 MR. LINDSMITH: That they can assert the claim  
9 against us and we have no ability to assert any defenses to  
10 it.

11 THE COURT: Well, is there prejudice in a  
12 jurisprudential sense if your rights to assert all of those  
13 defenses are absolutely preserved then it's just a question  
14 of when in the process of dealing with the litigation you're  
15 able to assert those offenses?

16 Nobody's -- you're not paying anything, you're not  
17 incurring any counsel fee, you're simply in the same would  
18 say good position of where do you turn?

19 MR. LINDSMITH: I guess I have two responses, Your  
20 Honor. One is I think there is meaning to the phrase  
21 justice delayed is justice denied.

22 And secondly --

23 THE COURT: I think that's true, for example, if  
24 we're dealing with a murder trial, but this is -- this is an  
25 avoidance action.

1 I hear you, but I'm not sure that that -- that  
2 strong argument quite fits.

3 MR. LINDSMITH: The more traditional argument of  
4 prejudice where there's this type of delay over a period of  
5 time -- and really we're talking about events back in 2008  
6 and in our case 2007, 2006 is -- if there is a need for  
7 witnesses and where they are where are they? I know there's  
8 been a disbursement of Lehman employees and that could be.  
9 That's an unknown prejudice I will tell the Court, but that  
10 is always out there as a possibility that is a risk on us I  
11 would submit more than an Lehman.

12 But if I could speak to, Your Honor, what we're  
13 really asking for. In our objection we said noteholder  
14 defendants, that's only because quite frankly I thought  
15 there would be other objecting parties, but if it's just as  
16 to Nationwide we're asking for something very simple, which  
17 is give us limited discovery that indicates how they knew we  
18 were noteholders. Give us to discovery as to how they know  
19 we were noteholders, what records do they have indicating we  
20 were noteholders, our purchase of interest in a note in  
21 2006, a purchase of interest in a note in 2007, shouldn't be  
22 that hard to produce. This would indicate they knew who we  
23 were and where we were. And with that give us a shot at an  
24 argument. And it's a simple status of limitations argument.  
25 They brief this argument in their motion for leave

1 to amend the second amended complaint, they briefed it in 11  
2 pages. They've already gone through the analysis. In that  
3 case they argued why the amendment related back. They  
4 talked about the rules governing service and adding new  
5 parties and why it relates back. They've already analyzed  
6 this.

7 I recognize this is a big issue for them, but it's  
8 not a complicated issue, it's a straightforward issue.

9 THE COURT: But it is an issue which if pressed by  
10 you because you get a carve out from the stay becomes the  
11 narrow end of the wedge that effectively destroys the  
12 benefit of the stay because others will say, well,  
13 Nationwide is taking discovery, we're in a very similar  
14 position, we'd like to do the same thing, and before you  
15 know it there's a whole crowd of people seeking what amounts  
16 to exceptions that collectively would undermine the efficacy  
17 of the stay.

18 MR. LINDSMITH: I would only suggest that the type  
19 of discovery of give us the records that you know why we're  
20 noteholders, even if you apply that to 100 other defendants  
21 or 200 defendants -- and we're only talking about the  
22 defendants that were named after the complaint was first  
23 filed. The original noteholder defendants, they're in  
24 there, there's no issue there about the statute of  
25 limitations. We're talking about the ones that were added

1 later, that's the category we're talking about.

2 THE COURT: How many -- how many defendants were  
3 added in the time period you're referencing?

4 MR. LINDSMITH: I want to say about 150.

5 THE COURT: That's a big number.

6 MR. LINDSMITH: It's a big number, but as a  
7 discrete category of discovery, if that's the only category  
8 of discovery with the resources of Lehman, it would strike  
9 me as something that's doable.

10 And I would submit to the Court my current  
11 instruction from my client is they're not interested in  
12 mediation or there won't be significant participation in  
13 mediation without knowing whether they should even be at  
14 this party because of the statute of limitations issue.

15 I don't know -- I can't speak for anybody else  
16 because they're not here, but I guess I would only ask the  
17 Court if -- I fully appreciate what's being balanced here in  
18 the larger scheme of things and I appreciate that in the  
19 larger scheme of things we're a relatively small player, but  
20 I would only ask the Court that if the Court is inclined --  
21 I want to take one last shot and ask at least we be allowed  
22 discovery so we know what to prime up for when the stay is  
23 lifted and just have that a little bit of discovery. Give  
24 us ten documents. I mean I think that's all it is.

25 But if the Court is not inclined to do that

1 because it's concerned about cracking the door open and  
2 inviting other parties asking for the same thing then I  
3 would ask that this truly be a six-month extension, not a  
4 one-year extension, and even then if I could just have the  
5 compromise that in six-months we be allowed to have what  
6 we're requesting now, if not today.

7 I'm hoping for something where we can at least  
8 start that threshold issue of whether we should even be in  
9 this party, Your Honor, and that's all.

10 THE COURT: Okay. Thank you.

11 Ms. Marcus?

12 MS. MARCUS: Yes. Just a couple points, Your  
13 Honor.

14 In terms of the prejudice in the objection the  
15 Nationwide parties talk about the fact that Lehman was  
16 permitted to take discovery yet it's not reciprocal because  
17 they're not being allowed to take discovery.

18 I'll point out that the discovery that Lehman took  
19 of the Nationwide parties was before they were added as  
20 defendants to the complaint, and now that they have been  
21 added as defendants there will be no discovery during the  
22 pendency of the stay. So the -- the imbalance alleged by  
23 Nationwide really doesn't exist.

24 I think Your Honor's point about this being the  
25 narrow edge of the wedge is I think what you said.

1 THE COURT: That is what I said.

2 MS. MARCUS: It reflects the debtors' view that if  
3 the window is open even a little bit then we will be  
4 involved in a major discovery process with numerous  
5 defendants.

6 Yes, there are 265 defendants in this litigation,  
7 I haven't really kept track of whether we only have three  
8 settlements, but of course the debtors have to prioritize in  
9 terms of the size of the potential claims, and they've been  
10 devoting their energy first to the largest claims, but we  
11 have every confidence in the world that over the next period  
12 of time as the big claims get resolved we'll be getting down  
13 to the smaller ones.

14 I'll also point out, Your Honor, that you've noted  
15 on several occasions that the Bankruptcy Court has the  
16 discretion to manage its docket and that's what's going on  
17 here.

18 So in light of the fact that there really is no  
19 prejudice we'd ask for a further six-month extension with no  
20 strings attached. I don't think it's appropriate for the  
21 Court now to say and in six months we have to deliver the  
22 discovery that's been requested, because I think it's more  
23 appropriate for the Court to evaluate the situation if we  
24 come back for another extension, which to be perfectly  
25 frank, I expect that we will, and to see where we stand at

1 that point.

2 THE COURT: Thank you.

3 With each incremental extension of the stay for a  
4 period of six months years go by, and I am increasingly  
5 sensitive to the potential for incremental prejudice to all  
6 of the defendants that are involved in all of the litigation  
7 that is subject to the stay.

8 One of the problems in balancing actual prejudice  
9 versus hypothetical prejudice is that actual prejudice  
10 always wins.

11 And there is actual prejudice to the case  
12 administration function associated with lifting the stay or  
13 refusing to extend the stay prematurely.

14 The challenge here is that the stay applies to a  
15 portfolio of litigation, the effect being that it applies to  
16 each of the individual cases and each of the individual  
17 defendants in those cases. The stay is a blunt instrument,  
18 but the impact of the stay is granular.

19 I am going to extend the stay for an additional  
20 six months. I do so recognizing that the stay has produced  
21 and is continuing to produce dramatic benefits in case  
22 administration, and I note that the settlements that have  
23 been achieved demonstrate that the alternative dispute  
24 resolution system is functioning at a high level; however,  
25 this cannot go on indefinitely.

1 At some point objecting parties will not need to  
2 identify particularized prejudice as to them, because the  
3 passage of time itself will serve that function.

4 As time passes memories fade and discovery  
5 conducted next year may lead to a lot of answers that I hear  
6 so frequently in depositions, quote, "I don't remember,"  
7 close quote.

8 The stay is extended with the understanding that  
9 at the next hearing, as if there is another hearing, the  
10 burden to further extend the stay may be greater.

11 MS. MARCUS: Thank you, Your Honor.

12 MR. LINDSMITH: Thank you, Your Honor.

13 THE COURT: Oh, and to be clear the objection of  
14 Nationwide Life Insurance Company and Nationwide Mutual  
15 Insurance Company is overruled.

16 MS. MARCUS: Thank you, Your Honor. The next  
17 matter on the agenda, Your Honor, will be handled by Joseph  
18 Serino of Kirkland & Ellis.

19 (Pause)

20 MR. SERINO: May I begin, Your Honor?

21 THE COURT: Sure.

22 MR. SERINO: Good morning, Your Honor. May it  
23 please the Court. My name is Joe Serino. I'm here on  
24 behalf of the debtors today in connection with their  
25 application to subordinate Boilermakers' claims under 510(b)

1 of the bankruptcy code. Not here today to challenge the  
2 allowance or the amount of those claims. That will come at  
3 a later time, if necessary.

4 I'd like to spend my time today focusing on three  
5 points. The first point is what I call a textural analysis  
6 of section 510(b) demonstrating that the CMBS at issue here,  
7 the collateralized mortgage-backed securities, are indeed  
8 securities of the debtor, SASCO, as that phrase is used in  
9 section 510(b).

10 The second point I'd like to make focuses on the  
11 facts and circumstances of the actual CMBS transaction so  
12 that we can make clear that the debtors actually did do the  
13 heavy lifting here, not the trust, when it came to the CMBS  
14 securities, and the final point, the third point, is a  
15 rebuttal to Boilermakers' arguments regarding SEC rule 191  
16 to show that that rule does not even address the issue of,  
17 much less alter the conclusion that the CMBS are securities  
18 of the debtor. So let me begin with that textural analysis,  
19 if I may, Your Honor.

20 The good news is the parties seem to agree on  
21 quite a bit here, and the issue before this Court, I  
22 believe, under 510(b) is a very narrow one. In a nutshell,  
23 it comes down to who is the issuer of the CMBS. If it is a  
24 debtor -- and it is. It's SASCO -- then Boilermakers'  
25 claims must be subordinated pursuant to 510(b), and I say

1 that, Your Honor, because the parties agree that there are  
2 three elements to a 510(b) mandatory subordination claim.

3 You have to have a security. You have to have a  
4 claim for damages arising out of the purchase or sale of  
5 that security, and the security must be a security of the  
6 debtor or its affiliate, and here, there is no dispute as to  
7 the first two elements. Boilermakers acknowledges that they  
8 have a security. They acknowledge their claim arises from  
9 the purchase of that security.

10 The only question is whether Boilermakers' CMBS  
11 are securities of the debtor, SASCO, as the debtors  
12 maintain, or are they securities of the trust, as I think  
13 Boilermakers is arguing, and the parties also agree,  
14 Your Honor, that under applicable federal securities laws  
15 and rules, the debtor, SASCO, as the depositor of the  
16 collateral into the trust -- and we'll talk about this in a  
17 bit -- is indeed the issuer.

18 I don't think there's any dispute about that in an  
19 asset-backed securitized transaction like this that the  
20 debtor for federal securities law purposes is the issuer,  
21 and, in fact, in response to the debtor's initial argument  
22 that Boilermakers' claims were dead on arrival for a lack of  
23 privity between Boilermakers and the debtors, Boilermakers  
24 itself invoked and relied on these very same federal  
25 securities laws as its ticket of admission into these

1 bankruptcy proceedings, and I quote. At paragraph nine of  
2 their response that they signed and filed with this Court on  
3 October 13, 2011, Boilermakers said, quote, "Under the  
4 Securities Act, whereas here the issuer of the securities is  
5 merely a shell entity with no assets, the depositor, such as  
6 SASCO, is considered the issuer and is liable under section  
7 11 of the Securities Act."

8 So, in other words, in trying to talk themselves  
9 out of a privity problem, they talked themselves into a  
10 subordination problem, and, when they realized that -- when  
11 they realized, well, common sense says a security must be a  
12 security of its issuer, they pulled back a little bit, and  
13 Boilermakers started to argue, well, these federal  
14 securities laws identifying SASCO as an issuer of the CMBS  
15 have very narrow application and have no place in these  
16 bankruptcy proceedings or in the interpretation of 510(b),  
17 yet they offered no support for that position. In fact, I  
18 think the authorities, the applicable authorities, cut the  
19 other way, and there are lots of examples where courts  
20 looked to federal securities laws in interpreting  
21 securities-related bankruptcy statutes.

22 The most recent example -- we see it all the time  
23 in the Madoff cases. Judge Rakoff and others have routinely  
24 looked at the federal securities laws in interpreting, for  
25 example, the Safe Harbor of 546(e), but, even more

1 importantly, Your Honor, I think --

2 THE COURT: Don't get me started on that.

3 MR. SERINO: I was afraid that was a sore subject,  
4 but there was an interesting ruling yesterday, though, on  
5 502(d) that came out from Judge Rakoff's chambers. He  
6 reversed himself.

7 So, just as importantly, Boilermakers' position, I  
8 think, is inequitable. They can't have it both ways. They  
9 can't be allowed to invoke these federal securities laws as  
10 a sole basis to file their claim and to overcome their lack  
11 of privity, on the one hand, and then, on the other hand  
12 argue, well, these same federal securities laws should be  
13 ignored when it comes to the --

14 THE COURT: Well, --

15 MR. SERINO: -- treatment of that claim.

16 THE COURT: I don't mean to break into your  
17 argument, but here's the conundrum. As I understand it, the  
18 securities that give rise to the damage claims are  
19 securities that were issued by trusts, not by SASCO,  
20 correct?

21 MR. SERINO: No, Your Honor.

22 THE COURT: Did SASCO -- we're not dealing with  
23 trusts?

24 MR. SERINO: We are dealing with trusts. I took  
25 issue with the notion that the trust issued the securities.

1 I was taking issue with that notion.

2 THE COURT: Well, the trust distributed the  
3 securities, no?

4 MR. SERINO: Not really, Your Honor, not really.  
5 The trust -- I have a schematic, if I could hand up to the  
6 Court, that I think may help with this.

7 THE COURT: That may help.

8 MR. SERINO: Based on a prospectus. May I  
9 approach?

10 THE COURT: Yes, particularly since I said yes.

11 MR. SERINO: Thank you, Your Honor. I have one  
12 for counsel as well.

13 I think under the applicable securities laws, the  
14 trust is clearly called an issuing entity, no doubt about  
15 that, and what happens here, Your Honor, if you look at the  
16 prospectus --

17 THE COURT: So are you quibbling with the  
18 distinction between an issuer and an issuing entity?

19 MR. SERINO: Correct, Your Honor. I'm not  
20 quibbling with it. I am resting on that distinction.

21 There is a very much, under the federal securities  
22 laws, a distinction between an issuer and an issuing entity,  
23 and that's how Boilermakers was able to file the claim. The  
24 federal securities lawmakers say Boilermakers, if you buy  
25 from a trust -- and they didn't do that here. You'll see,

1 but, if you buy from a trust and you think you've been a  
2 victim of securities fraud, your remedy doesn't rest with  
3 the trust.

4 You can look through it, and you can look to the  
5 depositor as the issuer, because it is the depositor who is  
6 the registrant of these securities. It is the depositor who  
7 owns the registration statement, the prospectuses and who  
8 makes the misstatements or omissions, if any, and that is  
9 the fundamental difference, and so, it would be anomalous to  
10 have the federal securities laws say Boilermakers, if you  
11 think you're a victim of a securities fraud, you can look  
12 through this trust. You can pierce it. It's just a vessel.

13 You can pierce it and, at the same time, go after  
14 the depositor, SASCO as the issuer and, at the same time,  
15 deny that these securities you're suing on are securities of  
16 SASCO. That's the anomaly you would have if you buy  
17 Boilermakers' argument, and what happens here, Your Honor,  
18 is --

19 THE COURT: Why don't you take me through the  
20 chart?

21 MR. SERINO: I will indeed. So LBHI, who is the  
22 debtor, originates mortgages or buys mortgages. It pulls  
23 them. It then transfers them to SASCO, who is the  
24 depositor/issuer. That's what the federal laws say. If  
25 you're a depositor, you're the issuer.

1 SASC0 then takes the mortgage pools and gives them  
2 to the trust. They create a trust. They deposit the  
3 mortgage-pooled collateral into the trust.

4 The trust then gives certificates to SASC0. SASC0  
5 then registers the securities. They file a registration  
6 statement. They do prospectuses, supplemental prospectuses,  
7 offering memos, and they retain an underwriter, in this  
8 case, LBI, who's in the SIPA proceeding, to interface with  
9 the street and distribute the securities, sell the  
10 securities.

11 LBI goes out to the Boilermakers of the world and  
12 sells the securities. The Boilermakers of the world pay LBI  
13 for the securities. LBI, as the underwriter, then strips  
14 out its fees or its commission and gives the net offering  
15 proceeds back to SASC0, where they stay. That's SASC0's  
16 payment for the mortgage pools.

17 So the certificates, Your Honor, never go from the  
18 trust to the purchasers, to Boilermakers. They go from the  
19 trust to SASC0 to LBI to Boilermakers.

20 The payments, the net offering proceeds for the  
21 securities, never go from the purchaser, the Boilermakers of  
22 the world, to the trust. They go from Boilermakers to LBI  
23 to SASC0, and, even the interest earned on the securities  
24 doesn't come from the trust to Boilermakers.

25 It comes from a servicer or a master servicer to

1 Boilermakers, and so, when you look at it this way,  
2 Your Honor, that's what I meant by my second point. The  
3 trust is really simply a repository for the mortgage assets.  
4 The debtors do everything else.

5 THE COURT: Well, that may be, but there seem to  
6 be some -- to me, some missing lines. The net effect of the  
7 transaction -- and I may be misunderstanding it -- is that  
8 Boilermakers, as purchaser, ends up owning certificates in  
9 the trusts.

10 MR. SERINO: That's fair.

11 THE COURT: Correct?

12 MR. SERINO: That's fair, Your Honor.

13 THE COURT: So the equity interests that it holds  
14 are interests in a non-debtor.

15 MR. SERINO: Well, if you're asking for comment on  
16 that, Your Honor, I'm not sure I agree with that.

17 THE COURT: Are you suggesting that the equity  
18 interests are, in fact, debtor equity or debtor affiliate  
19 equity?

20 MR. SERINO: I think there is an argument that it  
21 is debtor affiliated equity. I think there's an argument --  
22 I'm not making it now -- that the trusts are affiliates of  
23 the debtor, because the trusts are subject to an operating  
24 agreement between the debtors and the trust. So I think  
25 there's an argument that the trust could be an affiliate.

1 I think the notion I was having some problem with  
2 is the fact that these are debt securities, not equity  
3 securities, and what Boilermakers actually has an interest  
4 in is the pool of collateral that is owned by the trust, and  
5 so, I guess I don't know if it's right to say they have an  
6 equity interest in the trust. I'm not saying that's wrong.  
7 I'm just not certain that's right. What I know I can say is  
8 that Boilermakers has an interest in the pool of collateral  
9 that is owned by the trust once the trust purchases that  
10 collateral from SASCO.

11 THE COURT: Now, what is the document that  
12 evidences that interest?

13 MR. SERINO: I believe it's their shares, their  
14 certificates.

15 THE COURT: Okay, and so, --

16 MR. SERINO: And the offering documents would make  
17 that clear as well.

18 THE COURT: And we're talking about RMBS  
19 securities?

20 MR. SERINO: I think there's a combination here of  
21 CMBS and RMBS.

22 THE COURT: Okay. We're talking mortgage-backed  
23 securities that we're all familiar with?

24 MR. SERINO: Correct.

25 THE COURT: Those securities are not, however,

1 equity interests in SASCO, are they?

2 MR. SERINO: That's true, Your Honor.

3 THE COURT: In what way is 510(b) implicated in a  
4 setting in which Boilermakers does not have an equity  
5 security in the debtor?

6 MR. SERINO: I would say this, Your Honor. Again,  
7 I think the distinction between debt securities and equity  
8 securities is a relevant one. I think the cases that talk  
9 about does the purchaser really have an equity interest in  
10 the other entity really talks about equity securities where  
11 it makes more sense than debt securities, where you're  
12 dealing with claims, but, more importantly, Your Honor, if  
13 you look at 510(b) -- and it's unambiguous, so we don't get  
14 behind the statute or into its purpose or intent or the  
15 legislative history -- there is no reference to having an  
16 equity interest in the debtor. You just need to have three  
17 things.

18 You need to have a security. You need to have a  
19 claim arising from the purchase of that security, and it has  
20 to be a security of the debtor, and our point is, when the  
21 debtor is the issuer, when the debtor is the registrant,  
22 when the debtor does the offering materials, you satisfy the  
23 security of the debtor, and that's exactly, Your Honor, what  
24 Judge Walrath did in the WaMu case.

25 We haven't found a lot of cases directly on point

1 dealing with this question, but that's exactly what  
2 Judge Walrath did when she was confronted with this issue of  
3 whose securities are these. She said -- she didn't ask  
4 whether the security holder had an equity interest in an  
5 entity. She said, well, who's the issuer, because of the  
6 debtor must at least mean or include who's the issuer of the  
7 securities, and that's how she framed the dispositive  
8 question under 510(b) regarding the phrase "of the debtor."

9 Now, unfortunately, she did not have before her  
10 all of these federal securities laws and rules making clear  
11 that, in an ABS transaction, the depositor is the issuer.  
12 She didn't have that when she made her decision, but she  
13 goes on in dicta to say I want to use a hypothetical where  
14 one entity is selling Apple stock, and she makes clear that  
15 the question is not merely who's doing the selling, but  
16 whose securities are being sold, and Boilermakers places a  
17 lot of reliance on that hypothetical, but I think that  
18 hypothetical is actually a problem for Boilermakers'  
19 position, because the debtors are analogous to Apple here.

20 Now, I can't say that the security holder has an  
21 equity interest in the debtor, but I can say that, like  
22 Apple, the debtors, not the trust or some downstream seller,  
23 is the registrant of the securities being sold by others. I  
24 can say that, like Apple, the debtors and not some  
25 downstream seller is the issuer of the securities being

1 sold, and so, in other words, Your Honor, Boilermakers wants  
2 to argue that it was the trust/issuing entity that did the  
3 selling here, even though we've just been through a  
4 schematic that says that's not really the case, but, if they  
5 want to argue that, that still begs and leaves unanswered  
6 the question under 510(b) whose securities were being sold.

7 Whose are they, and I think the federal securities  
8 laws say they are the securities of the issuer. They are  
9 the securities of SASCO.

10 Now, Judge Bernstein had an interesting footnote  
11 in in re: Granite partners. If I may, Your Honor, approach?

12 THE COURT: Yes.

13 MR. SERINO: Footnote 18 of a 1997 decision. So  
14 it was not dealing with ABS, and it was dealing with the  
15 "arising from" language under 510(b), not the other  
16 securities language, but I think it applies with equal force  
17 to the "of the debtor" phrase, and I think it applies to ABS  
18 Securities.

19 First, talking about this distinction between  
20 selling and issuers or an issuance-related claim,  
21 Judge Bernstein said, "In addition, the Amerex (sic)  
22 District Court apparently read section 510(b) as limited to  
23 the issuance and sale of the security. The statute does not  
24 contain any such restriction, and it is not limited to  
25 issuance-related claims," but then -- I think this is

1 getting to where Your Honor was going.

2 Judge Bernstein goes on to explain why the  
3 identity of the issuer is so important here, and he says,  
4 "One who buys an outstanding share of stock on the open  
5 market from a third party based upon false statements  
6 uttered by the issuer holds a subordinated federal  
7 securities fraud claim in the issuer's bankruptcy. Although  
8 the investor never deals with the issuer and does not allege  
9 fraud in connection with the issuance of a security, his  
10 claim would nonetheless fall within section 510(b)," and so,  
11 that is the point here, Your Honor.

12 If the allegedly defective registration statement  
13 and supplemental prospectuses in the offering materials of  
14 SASCO are what give rise to Boilermakers' claim, then, just  
15 like Bernstein recognized in in re: Granite Partners, that  
16 means Boilermakers has a subordinated claim in SASCO's  
17 bankruptcy. If you're going to go after the issuer based on  
18 the issuer's statement, your claim is subordinated in the  
19 issuer's bankruptcy. You don't have the claim against the  
20 third party seller, and so, I would say, put differently,  
21 Your Honor, if these CMBS are not the securities of the  
22 issuer/registrant, SASCO, whose securities are they. We  
23 have to answer that question under 510(b).

24 The third point I wanted to make, Your Honor --  
25 I'll skip the factual one, unless Your Honor has more

1 questions about the factual one, but the point of that  
2 factual analysis was to show that, contrary to Boilermakers'  
3 representations, there was no effort to separate the debtors  
4 from the certificates. The debtors were intimately involved  
5 in the distribution chain of the certificates. The debtors  
6 were intimately involved in the registration of the  
7 securities, the sale of the securities, the service of the  
8 securities.

9 The third point I wanted to make is based on some  
10 submissions by Boilermakers, including a letter they  
11 submitted to the Court before the last argument without  
12 leave. I think they're going to argue -- I may be wrong. I  
13 think they're going to argue that, even if these federal  
14 securities laws do apply, one of those laws, SEC rule 191,  
15 establishes, according to them, that the CMBS are securities  
16 of the trust/issuing entity, not SASCO, the issuer. I just  
17 want to make two points in response to that argument,  
18 Your Honor.

19 First, when SEC rule 191 talks about the depositor  
20 being a different issuer from that same person acting as a  
21 depositor for an issuing entity or for purposes of its own  
22 securities -- it's a garbled rule, but that's what it talks  
23 about -- it's not suggesting that the ABS, the asset-backed  
24 securities, are not securities of their issuer. That's just  
25 counterintuitive, but it's certainly not suggesting that the

1 ABS are securities of the trust.

2 Counsel is not going to be able to point you to  
3 anything in SEC rule 191 or the comments that said the ABS  
4 securities are securities of the trust. The reason he's not  
5 going to be able to do that is because it's not there and  
6 because that's not the purpose of the rule.

7 That rule, 191, isn't there to figure out whose  
8 securities they are. The purpose of that rule is to tell  
9 people that, when an issuer elects to issue securities  
10 through an ABS trust structure rather than directly to the  
11 public, they want to use a trust structure in between them  
12 and the public -- when an issuer does that, what that rule  
13 is saying -- you, issuer, are going to be subject to the  
14 same exemption requirements under these federal rules.  
15 You're not going to enjoy some exemption you may be entitled  
16 to when you issue the securities directly.

17 That's the purpose of that rule. It's not to  
18 identify whose securities they are. It's just saying, if  
19 you choose to use a trust structure to issue securities,  
20 you're going to have to go through the steps and get  
21 whatever exemptions you may be entitled to using a trust  
22 structure. You're not going to be able to claim exemptions  
23 you may be entitled to when you don't use a trust structure.  
24 That's the purpose of the rule. I didn't want the Court to  
25 be confused by it.

1           So, unless Your Honor has any further questions, I  
2           am prepared to rest and would ask that the Court grant  
3           debtor's petition to subordinate Boilermakers' claims  
4           pursuant to 510(b).

5           THE COURT: Okay.

6           Mr. Etkin?

7           MR. SERINO: Thank you, Your Honor.

8           MR. ETKIN: Good morning, Your Honor. Michael  
9           Etkin, Lowenstein Sandler, on behalf of the Boilermakers.

10           I think we do agree on one thing here, Your Honor,  
11           with respect to the issue that's before the Court, and the  
12           issue can be boiled down, pardon the pun, as to whether the  
13           mortgage-backed securities, which I think the Court got  
14           right -- they were issued by the trusts. They were not  
15           issued by SASCO, and I'll get to that in a moment.

16           Whether they're securities of the debtor or an  
17           affiliate of the debtor, as set forth in 510(b), and, aside  
18           from the language of 510(b) itself, which certainly doesn't  
19           include the word issuer in its language in terms of the  
20           applicability of 510(b), the character of the securities  
21           themselves, which I'll discuss in a moment, and the SEC  
22           rules -- we believe that the legislative history and the  
23           stated purpose of 510(b), largely ignored by the debtor in  
24           their papers, must also be taken into consideration. That's  
25           certainly what Judge Walrath did in connection with her

1 opinion in Washington Mutual, and the bottom line there,  
2 Your Honor, is that it's the concept of bootstrapping by an  
3 investor who purchased equity or debt securities, and a lot  
4 was said during counsel's argument that the distinction  
5 between debt or equity securities is a significant one. For  
6 purposes of this issue, Your Honor, that's a distinction  
7 without a difference.

8 They're not equity securities of SASCO. I think  
9 that's clear. They're certainly not debt securities of  
10 SASCO. These mortgage-backed securities appear nowhere in  
11 the capital structure of either LBHI or SASCO, despite the  
12 fact that it's clear, as we've said in our papers, that  
13 their fingerprints are all over this transaction, but that  
14 isn't the standard by which 510(b) applies.

15 That's not the language of 510(b). That's not how  
16 it's been interpreted in the past. So I think you have to  
17 look at all of those issues in order to deal with the issue,  
18 the singular that's before Your Honor today.

19 Now, the debtor advances two arguments in support  
20 of their position, one that Boilermakers somehow admitted  
21 that 510(b) applies by virtue of referring to SASCO as both  
22 depositor and issuer in its prior response to the initial  
23 claim objection and -- I'm sorry, Your Honor. There's no  
24 getting around that, Your Honor.

25 That's true, and there's no getting around rule

1 191, which deems the depositor, in this case, SASCO, as the  
2 issuer for reporting and disclosure purposes, because the  
3 issuer does not have a board of directors. It is a created  
4 entity in connection with this transaction, and the SEC, in  
5 its wisdom, wanted to make sure that there was somebody  
6 making disclosures and making filings that, at the end of  
7 the day, would be responsible.

8 Now, that doesn't go to the issue of whether the  
9 securities are securities of SASCO or not. You have to look  
10 at the security itself. You have to look at the investment.  
11 You have to look at the risk that purchasers were  
12 undertaking in order to determine whether 510(b) should  
13 apply, and I'll get to that. I know we've covered it in our  
14 papers, Your Honor, but I think, you know, it's important to  
15 emphasize at least a couple of issues here.

16 Your Honor, let's talk about the certificates  
17 themselves. Now, counsel did hand out this schematic. I  
18 must tell you that I don't necessarily agree with it. It's  
19 the first that I've seen it, and, to the extent it's  
20 intended for the evidence of the transaction, I don't think  
21 there's any evidence before Your Honor to support the  
22 position that they're attempting to take through this  
23 schematic.

24 THE COURT: It's simply to facilitate argument.  
25 It's not evidence.

1 MR. ETKIN: Oh, I understand that, Your Honor. I  
2 understand that, Your Honor, and, for that purpose, I have  
3 no objection. I just want to point out that it's used to  
4 reach a conclusion that's really not the supportable  
5 conclusion with respect to this case and the issue before  
6 Your Honor.

7 First of all, the certificates in question  
8 represent, as the Court pointed out, interests in non-debtor  
9 trusts and the mortgages that the trusts hold. That's what  
10 these certificates represent. Those are the interests that  
11 have been purchased by Boilermakers and others who purchased  
12 these mortgage-backed securities.

13 The trusts, as you've heard, Your Honor, are the  
14 issuing entity in connection with these securities, and  
15 there's a distinction with a difference, which I'll get to  
16 in a moment as well. The certificates represent obligations  
17 of the trust to pass through funds or payments received in  
18 connection with the underlying mortgages.

19 Now, Your Honor, there was reference in the  
20 debtor's first reply to an August 8th, 2006 registration  
21 statement, although it wasn't attached to their papers. For  
22 purposes of the hearing today, I didn't pull all 1,800 pages  
23 of it, Your Honor, for everyone's benefit, but I did pull  
24 the first 80 pages of it, which have some relevant  
25 statements in the registration statement itself, again, the

1 one that was referred to in the debtor's papers.

2 If I may approach? I've handed a copy to counsel  
3 already.

4 THE COURT: Yes, you may approach.

5 MR. ETKIN: There are a couple of things in here  
6 that are worth pointing out, and I won't take much time,  
7 because it's only a few things. If Your Honor turns to the  
8 -- I guess what's indicated as the fourth page, it indicates  
9 Structured Assets Securities Corp., and then, underneath it,  
10 depositor, and then, it talks about, below that, what each  
11 trust fund does, the trusts that we've been talking about,  
12 and the first bullet point there is may periodically issue  
13 asset-backed pass-through certificates or asset-backed notes  
14 in each case in one or more series with one or more classes.

15 Hence, the conclusion that the trust is the issuer  
16 of these securities or issues these securities or is the  
17 issuing entity, and, if you look below that, there's a  
18 reference to the securities with a colon next to it, and the  
19 second bullet point there says that the securities will  
20 evidence beneficial ownership of or be secured by the assets  
21 in the related trust fund and will be paid only from the  
22 trust fund assets described in the related prospectus  
23 supplement. Again, not the debtor's assets, not a security  
24 of the debtor, and not based upon any investment in the  
25 debtor and the financial success or failure of SASCO or any

1 other debtor as an entity.

2 If you look at page six, Your Honor, the last full  
3 paragraph, it talks about the depositor's only principal  
4 obligations, and those are the representations and  
5 warranties made by the depositor. Those are its  
6 obligations.

7 Just a few more to drive the point home,  
8 Your Honor. If you look at what's marked as page 40, it  
9 talks about limited obligations and that the assets of the  
10 trust fund -- and I'm quoting -- "are the sole source of  
11 payments on the related securities. The securities are not  
12 the obligations of any other entity." That's from the  
13 registration statement.

14 Pardon me for one second, Your Honor.

15 Going further into the document, look at page 49.  
16 Talks about the trust funds, and then, the first paragraph  
17 underneath that, it says, "The securities will be non-  
18 recourse obligations of" -- and I emphasize the word of --  
19 "the trust funds, not of SASCO, not of any other debtor.

20 It's of the trust fund, and then, you go further,  
21 that the holders may not proceed against any assets of the  
22 depositor or its affiliates or assets of the trust fund not  
23 pledged to secure the notes, and then, finally, Your Honor,  
24 the depositor, on page 79, which is the next-to-last page,  
25 is just identified as SASCO. Nowhere is SASCO identified as

1 the issuer. SASCO being deemed an issuer is a function of  
2 rule 191, which again, I will get to in a moment, and the  
3 debtor's pretty much admit this point, Your Honor, or  
4 concede this point.

5 When you look at their initial claim objection --  
6 and I'm reading from paragraph two, and I'm quoting. "The  
7 no liability CMBS claims are all filed by holders of  
8 securities that are issued by non-debtor securitization  
9 trusts. These securitization trusts purchase commercial  
10 mortgage loans from the debtor and issued securities  
11 collateralized by receipts of payment of interest or  
12 principal on the loans. The debtors did not issue the  
13 securities to the security holders and are not liable for  
14 any payments to the holders of such securities or any other  
15 obligations of the trust." I wholeheartedly agree with that  
16 statement from the debtor's papers, Your Honor.

17 They go on to state, in paragraph 11 -- and I'm  
18 quoting again. "The security holders as holders of  
19 securities issued by the trusts and pursuant to the  
20 indentures, trust agreements, or other documents governing  
21 the securities are creditors of the trusts only." The  
22 trusts are not obligations of any debtor, Your Honor.  
23 They're not obligations of any affiliate.

24 I heard counsel allude to the affiliate argument  
25 that they don't make in their papers. The only argument

1 that they make and that's before the Court today is the  
2 argument that these certificates are securities of SASCO for  
3 purposes of 510(b), and finally, Your Honor, the return on  
4 investment is based solely on the performance of the  
5 underlying loans owned by the trust. It's not based on the  
6 performance of any debtor entity.

7 The mortgages are not property of any debtor's  
8 estate. They're property of the trusts, and purchasers of  
9 these securities are not taking a flier on whether any  
10 debtor is going to perform well, not perform well, the  
11 financial position of any debtor. Their investment is  
12 solely focused on whether these mortgages owned by the trust  
13 perform or don't perform.

14 Now, what is the Boilermakers' relationship with  
15 the debtors? They have one relationship here and one  
16 relationship only, Your Honor, and that relationship is that  
17 of a tort with (sic) them. There are section 11 claims  
18 under the securities laws, again, alluded to by plaintiff's  
19 counsel, because the SEC, again, in their wisdom, decided in  
20 a transaction like that that someone else needs to make  
21 representations and disclosures, and, to the extent that  
22 they make misrepresentations or fail to disclose, they're  
23 responsible.

24 That doesn't turn these certificates into  
25 securities of that debtor entity. Again, they are not, and

1 there are other claims as well as a tort victim, obviously,  
2 misrepresentation claims, et cetera. Those are the claims  
3 that are at issue here.

4 THE COURT: What's the amount of those claims?

5 MR. ETKIN: Your Honor, the amount of the claims  
6 in total asserted that are the subject of this objection are  
7 somewhere around \$12 million plus, give or take. I didn't  
8 do the math. I have the numbers for each of the claims. I  
9 neglected to add them up. I apologize, but it's all in our  
10 papers (sic).

11 Your Honor --

12 THE COURT: And what's the basis for the claim?

13 MR. ETKIN: The basis of the claim are  
14 misrepresentations in connection with the information that  
15 was provided by SASCO as depositor in connection with this  
16 security.

17 THE COURT: It sure does sound like a garden  
18 variety securities claim, doesn't it?

19 MR. ETKIN: It is a securities claim, but it's not  
20 a securities claim involving a security of any debtor. Yes,  
21 we're not disputing that there's a securities claim element  
22 to this at all. We've admitted to that up front. There are  
23 also state law claims for misrepresentation and fraud here  
24 as well, but those claims are based upon the conduct of  
25 SASCO as depositor in connection with this transaction.

1 THE COURT: The challenge here is that we're  
2 dealing with a highly structured transaction that is  
3 susceptible of multiple characterizations, depending upon  
4 which part of it you examine most closely, and we also have  
5 the interface of securities law principles and bankruptcy  
6 principles, and I suspect that at the time that this was all  
7 being put together, there wasn't one brain that decided what  
8 would be the right result in a situation like this. As a  
9 result, we're all making it up.

10 MR. ETKIN: Well, this is a novel issue,  
11 Your Honor, but I think there was one brain that decided, as  
12 is the case in most mortgage=-backed securities transactions  
13 and offerings that I've seen and is the case in this  
14 registration statement, that there's an effort to place a  
15 distance between the sponsor, the depositor, and the issuing  
16 entity in terms of who has obligations and who doesn't and  
17 what you're buying and what you're not buying and what  
18 assets stand behind these securities and what assets don't,  
19 and that's all over the registration statement, and it's  
20 clear from the face of this transaction that there was an  
21 intentional effort to create space between the debtors and  
22 the issuing entity who issued these certificates, based upon  
23 the mortgages that they owned, the pools of mortgages that  
24 they owned.

25 I do want to point out one other thing in page 12

1 of the debtor's reply that first raised the issue of 510(b),  
2 because a statement was made, Your Honor, that there's  
3 nowhere in the SEC regulations that we're talking about here  
4 today that talks about these securities being securities of  
5 the trusts. Well, I beg to differ.

6 I'll get to some more examples in a moment,  
7 Your Honor, but, if you look at paragraphs 31 and 32, where  
8 they quote the language from the SEC rules, the language  
9 they quote is that the depositor for the asset-backed  
10 securities, acting solely in its capacity as depositor, to  
11 the issuing entity is the issuer for purposes of asset-  
12 backed securities of that issuing entity. That's the  
13 language. Of that issuing entity, and similarly, with  
14 respect to the exchange act (sic), same language. The  
15 depositor for the asset-backed securities, acting solely in  
16 its capacity as depositor to the issuing entity is the  
17 issuer for purposes of the asset-backed securities of that  
18 issuing entity. Now, that tracks precisely, Your Honor, the  
19 language of 510(b) in terms of whether these securities are  
20 securities of SASCO or securities of the issuing entity.

21 Let me get, for a few moments, Your Honor, into --  
22 THE COURT: But 510(b) doesn't use the term issuer  
23 or issuing entity.

24 MR. ETKIN: That's absolutely correct, Your Honor,  
25 but we know who the issuing entity is. That's the reason

1 why I quote the language. There's no dispute that the  
2 issuing entity are the trusts. So, if you just substitute  
3 trusts for issuing entity, you come up with the inescapable  
4 conclusion that even the SEC saw these as asset-backed  
5 securities of the trusts, of the issuing entity. That's the  
6 reason I quote the language, and there is more evidence,  
7 Your Honor, from the regulations themselves supporting  
8 Boilermakers' position here today, and the letter that we  
9 did send to Your Honor with the excerpts from the cite that  
10 we provided in our papers were just an effort to make life  
11 easier for the parties. It wasn't anything new. It was  
12 just to put it front and center before Your Honor for  
13 purposes of reviewing the issues and the papers before the  
14 Court.

15 Again, if you look at the first page that we  
16 provided Your Honor, a is the language that I just quoted,  
17 and b is the language that makes the distinction between an  
18 issuer for purposes of this rule and an issuer for purposes  
19 of that person's or entity's own securities. So it's clear  
20 that the SEC even recognized that these securities are not  
21 SASCO's or the depositor's own securities.

22 Then, we go to the second page that we provided  
23 Your Honor, a comment on the rule, and I'll just, you know,  
24 quote one piece of language here. We are adopting -- this  
25 is from the comments from the SEC. "We are adopting new and

1 amended rules and forms to address comprehensively the  
2 registration disclosure and reporting requirements for  
3 asset-backed securities under the Securities Act of 1933 and  
4 the Securities Exchange Act of 1934."

5 Again, this flows with the inescapable point, from  
6 our perspective, Your Honor, that deeming the depositor the  
7 issuer is to deal with registration disclosure and reporting  
8 requirements as it relates to the registration statement and  
9 the issuance of the securities by the trusts.

10 The next thing I'll point to, Your Honor -- and I  
11 think these are -- it's short, and I believe these are  
12 important -- is what's marked at the bottom as page 10,  
13 talking about the structure of asset-backed securities, and  
14 again, I'm quoting. "The structure of asset-backed  
15 securities is intended, among other things" -- this is the  
16 point you were talking about a moment ago, Your Honor -- "to  
17 insulate ABS investors from the corporate credit risk of the  
18 sponsor that originated or acquired the financial assets."

19 So these securities themselves are not, as 510(b)  
20 describes in its legislative history, as Slain and Kripke  
21 describe in their law review article which led to the  
22 enactment of 510(b), as Judge Walrath talks about in her  
23 opinion in WaMu -- this is not an example of Boilermakers or  
24 any other purchaser buying an investment, whether it's a  
25 debt or equity investment, in SASCO or in LBHI and taking

1 the risk of whether either of those entities succeed or fail  
2 economically, and then, when they fail and when the  
3 securities purchaser, debt or equity, is dissatisfied, they  
4 institute a fraud claim against one or both of those  
5 entities attempting to bootstrap themselves up the ladder to  
6 the status of unsecured creditor. That's what 510(b) was  
7 intended to deal with, and that just isn't present in this  
8 case.

9 THE COURT: But there is bootstrapping, because  
10 you're making a claim against SASCO as issuer with respect  
11 to securities that you are urging are remote from SASCO, and  
12 the crossover is the problem.

13 MR. ETKIN: Well, Your Honor, I understand the  
14 Court's point, but where asserting claims against SASCO as  
15 depositor by virtue of the role that it played in connection  
16 with these certificates and the representations that it made  
17 and the disclosures that it made. These are tort claims  
18 against SASCO based upon the role that it played in this  
19 transaction.

20 Far be it for us to even suggest that a debtor  
21 entity was not involved in connection with these securities  
22 as sponsor or depositor. Again, they were very much  
23 involved in creating this type of security.

24 THE COURT: But the securities are out there in  
25 great quantity. We, I think, recognize that they're unique

1 creatures of Wall Street. They are highly structured, and  
2 it is the rare ordinary human being who understands them.

3 One of the problems here, though, is that you're,  
4 in effect, trying to have it both ways. You're asserting a  
5 benefit associated with the highly structured nature of the  
6 transaction while imposing a burden associated with SASCO's  
7 role in having caused these securities to be issued in the  
8 first place.

9 MR. ETKIN: Your Honor, I don't think we're trying  
10 to have it both ways, and, if one of the issues that the  
11 Court is concerned about is the fact that there may be a  
12 securities law violation here, even if there wasn't, there  
13 would still be state law misrepresentation and fraud claims  
14 and fraudulent misrepresentation claims to assert against  
15 SASCO based upon its role in connection with this  
16 transaction.

17 What you have to come back to, in our view, is  
18 what 510(b) is intended to prevent, and it's not intended to  
19 shield SASCO in connection with this transaction from its  
20 own tortuous conduct in connection with this transaction,  
21 where SASCO may be deemed an issuer for SEC reporting and  
22 disclosure purposes, but these are equally clearly not  
23 securities of SASCO and not securities of a debtor, and,  
24 when you look at the mindset of the investor and the  
25 information before the investor and all of the statements in

1 the registration statement as to whose obligations these  
2 are. An investor is not purchasing these certificates based  
3 upon the financial condition or the financial performance of  
4 SASCO or a debtor, which would be the case if they were  
5 purchasing equity or debt securities --

6 THE COURT: Are these rated securities?

7 MR. ETKIN: Your Honor, I believe they were rated  
8 securities at the time, but I don't know exactly where they  
9 stand today.

10 THE COURT: So they were being purchased on the  
11 strength of a rating?

12 MR. ETKIN: Well, I think there has been some  
13 litigation on that issue as well, Your Honor, and I think --

14 THE COURT: We're not litigating that here.

15 MR. ETKIN: I know, and I think, you know,  
16 somebody put Standard & Poor's in the spotlight recently  
17 with respect to some of that, but that's not why we're here.

18 THE COURT: I understand your argument.

19 MR. ETKIN: Let me just -- if I may, Your Honor.  
20 I know I've been droning on for a while, but bear with me  
21 for a couple more minutes.

22 THE COURT: I think it's really only going to be a  
23 couple of more minutes, because it's just about noon time,  
24 and there are still people to be heard.

25 MR. ETKIN: That's fine, Your Honor. I'll be as

1 quick as I possibly can.

2 I think page 11 -- again, I want to note for the  
3 Court the comments of the SEC as to what these regulations  
4 are for, which were Securities Act registration, disclosure  
5 communications, and ongoing reporting requirements, again,  
6 consistent with the position that we've taken. If you look  
7 at page 20, which we've provided with the Court, the  
8 beginning of the second paragraph, where it states, "As with  
9 the Securities Act, we are adopting our proposed  
10 specification that the depositor is the issuer for purposes  
11 of Exchange Act reporting regarding asset-backed  
12 securities." Not that the depositor is all of a sudden the  
13 issuer of these securities for purposes of 510(b), and  
14 finally, Your Honor --

15 THE COURT: I understand your argument, Mr. Etkin.  
16 You really have to wrap it up.

17 MR. ETKIN: Thank you, Your Honor.

18 Your Honor, with that, I think our papers have  
19 adequately stated the rest of the argument. I'll defer with  
20 respect to Your Honor's concerns about time.

21 There was a judicial admission argument in the  
22 debtor's response that I think we've dealt with and  
23 demonstrated that there was no admission here that 510(b)  
24 applies to these securities, and, with that, I appreciate  
25 the Court's time.

1 THE COURT: Okay.

2 Is there anything more?

3 MR. SERINO: No reply, Your Honor, unless you have  
4 questions for us.

5 THE COURT: No.

6 This is taken under advisement.

7 MR. SERINO: Thank you, Your Honor.

8 THE COURT: I do have one question. Assuming,  
9 just for the sake of discussion, that I were to determine  
10 that the claims are not to be subordinated under 510(b), I  
11 assume that there are continuing objections to the claim  
12 with respect to quantum causation and a variety of other  
13 objections, correct?

14 MR. SERINO: Absolutely, Your Honor.

15 THE COURT: And, assuming that I were to determine  
16 that the claims properly are to be subordinated under  
17 510(b), I assume that, in practical terms, that would mean  
18 no recovery?

19 MR. SERINO: That is correct, Your Honor, and we  
20 were candid about this in our papers. This is not just a  
21 \$14 million issue. We've got billions of these securities  
22 out there, so there will be some trickle-down effect of  
23 Your Honor's decision either way.

24 THE COURT: I understand. Thank you very much.

25 MR. SERINO: Thank you, Your Honor.

1 MR. ETKIN: Thank you, Your Honor.

2 MR. HORWITZ: Your Honor, Maurice Horwitz, Weil,  
3 Gotshal & Manges, on behalf of Sullivan's, Inc. (ph). The  
4 next item on today's agenda is LBHI's objection to the claim  
5 filed by CF Midas Balanced Growth Fund that is claim number  
6 67193, which is included on the one hundred and forty-third  
7 omnibus objection to claims.

8 The claim is based on LBHI's guarantee of a  
9 structured note issued by Lehman Brother's Treasury Co. and  
10 held by the Midas Fund. LBHI objected to this claim,  
11 because it was filed approximately one year after the bar  
12 date applicable to Lehman Program Securities' claims.

13 The Midas Fund has argued that its claim should be  
14 deemed timely filed on the grounds of excusable neglect, and  
15 the plan administrator has argued that the Midas Fund has  
16 failed to demonstrate grounds for such a finding. A hearing  
17 was held two months ago on December 19th, 2012, at which the  
18 parties presented their arguments on the excusable neglect  
19 issue.

20 In addition, counsel for the Midas Fund argued  
21 that its claim has been allowed, notwithstanding LBHI's  
22 pending objection and that before this Court considers the  
23 excusable neglect issue, it must determine whether section  
24 502(j) of the bankruptcy code applies to the late filed  
25 claim. Section 502(j) provides that a claim that has been

1 allowed or disallowed may be reconsidered for cause.

2 At the close of the hearing, Your Honor requested  
3 that the parties submit concise supplemental briefing on  
4 this discrete question and reserved judgment on the question  
5 of excusable neglect until the applicability of section  
6 502(j) had been determined. The Midas Fund submitted its  
7 supplemental brief with respect to the applicability of  
8 section 502(j) on January 21st, 2013. That is at ECF No.  
9 34056, and the plan administrator filed its reply on  
10 January 28th, 2013. That is at ECF 34230.

11 Your Honor, the Midas Fund's claim is one of  
12 approximately 21,000 proofs of claim that were filed against  
13 LBHI based on LBHI's guarantee of Lehman Program Securities  
14 as they're defined in the bar date order. These were highly  
15 -- these are highly complex instruments, and the  
16 determination of allowed amounts for claims based on these  
17 instruments is a very complex matter. For certain of LBHI's  
18 creditors who held substantial number of these securities,  
19 it was essential that LBHI devise a way to consensually  
20 resolve as many of these claims as possible pursuant to a  
21 consistent valuation methodology.

22 In the summer of 2011, in connection with the many  
23 settlements and compromises that led to the consensual  
24 confirmation of the debtor's plan, LBHI proposed a set of  
25 procedures that would enable LBHI to propose allowed amounts

1 to these thousands of claim holders as efficiently as  
2 possible and either agree or consensually resolve their  
3 disputes as to those amounts without affecting those  
4 claimants' substantive rights in any way. The procedures  
5 that were ultimately approved by this Court do just that,  
6 and LBHI sent notices of proposed allowed amounts with  
7 respect to those 21,000 claims, and claimants were given 60  
8 days to object to the amounts proposed. If no objection was  
9 interposed, the claims would be allowed in the amounts  
10 proposed.

11 Your Honor, this was clearly a mass mailing. Its  
12 purpose was to provide as many noteholders as possible with  
13 the opportunity to opt in to LBHI's proposed valuation  
14 methodology through quick and expedient procedures that also  
15 preserved all of the claimants' substantive rights,  
16 specifically the right to opt out of these procedures and to  
17 opt out of the effect of the order that approved those  
18 procedures. This was a necessary exercise, and it led to  
19 the -- it was one of the factors that led to the  
20 confirmation -- the consensual confirmation of this plan.

21 Because of the unprecedented scope and nature of  
22 this exercise, it was critical that the order approving  
23 these procedures and the confirmation order preserve LBHI's  
24 right to object to those claims on other grounds. Many of  
25 those grounds are procedural grounds, and they include that

1 the claim was not properly or timely filed. For this  
2 reason, both the order approving those procedures and the  
3 confirmation order clearly preserve LBHI's right to object  
4 to those claims, even after a valuation notice has been  
5 sent.

6 The Midas Fund's late filed claim is precisely  
7 this type of claim. That claim had been pending on the  
8 debtor's one hundred and forty-third omnibus objection to  
9 claims for months when LBHI sought approval of the program  
10 securities procedures and after it sent its valuation  
11 notices.

12 The Midas Fund received this notice and,  
13 therefore, received notice of the existence of the order  
14 approving those procedures, and it didn't object within the  
15 60 days provided in that notice. In other words, the Midas  
16 Fund chose not to opt out of those procedures and the  
17 effects of that order approving those procedures, including  
18 the reservation of rights enabling the plan administrator to  
19 prosecute this objection today.

20 Nevertheless, the Midas Fund has insisted on  
21 arguing that, by receiving this notice, LBHI somehow  
22 withdrew or mooted its objection and that its claim is now  
23 deemed allowed because no objection is currently pending.  
24 The fund has argued, in addition, that because of this, the  
25 plan administrator must now move for reconsideration of the

1 late filed claim pursuant to 502(j) of the bankruptcy code.

2 As we note in our supplemental papers and as this  
3 Court noted at the prior hearing on this matter, section  
4 502(j) does speak in terms of a deliberative process. There  
5 must have been some consideration for there to be a  
6 reconsideration, and that consideration has to be one of the  
7 Court. The bankruptcy rule that implements section 502(j)  
8 makes that very clear.

9 Rule 3008 of the federal rules of bankruptcy  
10 procedure provide that a party and interest may move for  
11 reconsideration of an order allowing or disallowing a claim  
12 against the estate. There is no procedural rule that would  
13 implement section 502(j) for the purpose of challenging a  
14 claim that is deemed allowed under section 502(a) because no  
15 party has objected to that claim. The proper means of  
16 challenging such a claim is by filing an objection pursuant  
17 to rule 3007. That is why those two rules exist side-by-  
18 side.

19 Now, the Midas Fund was afforded the opportunity  
20 to submit to this Court its best authority that would  
21 support an argument that section 502(j) should apply to the  
22 late filed claim. The only citation offered in the fund's  
23 supplemental brief is to Yancy v. Citifinancial, 301 B.R.  
24 861 from the Bankruptcy Court of the Western District of  
25 Tennessee. The Midas Fund argues in its brief that if

1 section 502(j) applied only to orders and not to claims that  
2 had been deemed allowed, then this would be contrary to the  
3 reasoning in Yancy, but, as we state in our papers, the  
4 holding in Yancy does not stand for that proposition at all.

5 Moreover, the facts in Yancy only go to reinforce  
6 the plan administrator's argument that section 502(j), as  
7 implemented through rule 3008, can only apply to the  
8 reconsideration of an order. The claim that was at issue in  
9 Yancy was allowed pursuant to an administrative order such  
10 that is common in Chapter 13 cases in the Western District  
11 of Tennessee. So, when the Court in Yancy held that the  
12 debtor in that case should file a motion to reconsider the  
13 claim of a secured creditor, it did so because that claim  
14 had been allowed pursuant to an order entered in that case.  
15 It was not a claim that was deemed allowed under section  
16 502(a) of the bankruptcy code.

17 At least one district court has agreed with our  
18 reading of Yancy. We cite in our papers to the consolidated  
19 appeal in re: Chapter 13 proceedings of Herrera 369 B.R. 395  
20 from the Eastern District of Wisconsin, which the district  
21 court disagreed with creditors attempting to cite Yancy for  
22 the proposition that, if a claim has been deemed allowed, it  
23 can only be challenged by way of a motion for  
24 reconsideration.

25 In those cases, the facts were more similar to the

1 facts in this case. The claims at issue had not been  
2 allowed by an order. Instead, the Chapter 13 trustees in  
3 those cases had sent notices indicating their intent to pay  
4 certain secured claims. No objections were interposed  
5 within the timeframe set by those notices, and subsequently,  
6 the debtors moved to dismiss -- the debtors moved -- I'm  
7 sorry. The debtors commenced out of state proceedings to  
8 disgorge payments of those -- that the trustees had made to  
9 those secured creditors.

10 When the defendants moved to dismiss those  
11 adversary proceedings, the bankruptcy court ruled that the  
12 debtors should have filed motions for reconsideration under  
13 rule 3008. On appeal, the district court reversed this  
14 decision of the bankruptcy court and made a very clear  
15 holding. Reconsideration applies after the bankruptcy court  
16 issues an order, not before. The district court reasoned  
17 that, if rule 3008 applies to claims that were merely deemed  
18 allowed, the debtors would always be required to move for  
19 reconsideration and would never be required or able to  
20 object under rule 3007.

21 As the Midas Fund states in its own brief, there  
22 is no order entered in these cases allowing the fund's late  
23 filed claim. Therefore, based on the arguments in our  
24 papers and the cases cited by the plan administrator in its  
25 supplemental reply, the plan administrator submits that

1 section 502(j) does not apply to the fund's late filed  
2 claim.

3 The Midas Fund also, as a factual matter, cannot  
4 argue that its claim is deemed allowed under section 502(a)  
5 of the bankruptcy code, at least not under the terms of the  
6 plan that governs in these cases. This claim was not timely  
7 filed. Under the plan, an allowed claim is defined as a  
8 claim that is not disputed, and disputed means, among other  
9 things, with respect to a claim, the claim as to which a  
10 proof of claim was not timely or properly filed.

11 So, under the terms of this plan, this is not an  
12 allowed claim. It is a disputed claim, even in the absence  
13 of an objection by the plan administrator or LBHI.

14 Now, the fund has argued that, by sending the  
15 notice, a valuation notice, LBHI somehow withdrew or mooted  
16 its objection and rendered the late filed claim to be an  
17 allowed claim, but, Your Honor, if this valuation notice had  
18 had any legal impact at all, it was only pursuant to an  
19 order entered by this Court, an order approving the  
20 procedures for sending those notices and preserving LBHI's  
21 right to prosecute this objection.

22 The fund argues that just the reservation of  
23 rights should not apply and that, in effect, it should be  
24 able to pick and choose provisions of that order that will  
25 or will not apply to it. Its justification for this

1 argument is that it was never provided notice of the order,  
2 but, in fact, every recipient of the valuation notice,  
3 indulging the Midas Fund, had ample time to object and to  
4 opt out of the effects of that order.

5 In fact, it had 60 days to object and opt out,  
6 whereas, if they had only had notice of the motion to  
7 approve the order, they would have had only 15 days. The  
8 Midas Fund chose not to opt out of the effect of that order.  
9 The Midas Fund, therefore, has no basis for arguing that the  
10 notice it received had the effect of barring or mooted  
11 LBHI's objection. Either the procedures order applies in  
12 this case -- and, in which case, LBHI's right to prosecute  
13 this objection has been preserved, or it does not apply, in  
14 which case the valuation notice had no legal impact at all.

15 The objection has never been withdrawn by LBHI.  
16 On the contrary, as we indicate in our reply, LBHI filed six  
17 notices of adjournment of this objection after the  
18 structured securities valuation notice was sent to the Midas  
19 Fund. The Midas Fund has not indicated in any way that it  
20 was prejudiced by the receipt of this notice. As stated at  
21 the last hearing, it's not clear what the Midas Fund would  
22 have done in detrimental reliance on this notice, and it is  
23 not clear how the Midas Fund would have acted differently if  
24 it had never received this notice.

25 For all of these reasons, Your Honor, the plan

1 administrator submits that section 502(j) should not be  
2 applied to the late filed claim and that the plan  
3 administrator should be permitted to proceed with  
4 prosecuting its objection to the late filed claim.

5 THE COURT: Thank you.

6 MR. GEOGHAN: Your Honor, David Geoghan, Young,  
7 Conaway, Stargatt & Taylor. I'm actually -- Mr. Patrick  
8 Jackson, also an associate from my firm, is going to lead  
9 the argument for us.

10 THE COURT: All right.

11 MR. GEOGHAN: Thank you, Your Honor.

12 MR. JACKSON: Good afternoon, Your Honor. Patrick  
13 Jackson as Mr. Geoghan indicated from Young Conaway on  
14 behalf of the CF Midas fund.

15 I think the way that -- that counsel has just teed  
16 this up, I actually think it's pretty simple. It boils down  
17 to essentially three issues, but the first I would like to  
18 tackle right away was that I agree that the purpose of our  
19 brief was to put our best authority forward on this notion  
20 that 502(j) applied and would require allowance of our claim  
21 here. And I definitely take issue with the assertion that  
22 we didn't put good authority forward, or that the only  
23 authority we put forward was a Chapter 13 case.

24 The primary authority and the best authority that  
25 I put forward and the best authority that you can put

1 forward is 502(j) of the code. The Bankruptcy Code, of  
2 course, is primary authority for anything -- any plausible  
3 interpretation that -- that it --

4 THE COURT: Well, it doesn't --

5 MR. JACKSON: -- will rest upon.

6 THE COURT: -- apply here.

7 MR. JACKSON: Section 502(j) of the code provides  
8 --

9 THE COURT: I just said it doesn't apply here.

10 MR. JACKSON: It -- it applies, Your Honor.

11 THE COURT: It doesn't apply here.

12 MR. JACKSON: A claim that has been -- allowed or  
13 disallowed --

14 THE COURT: It only applies -- it can't apply to  
15 trap in this instance. I had this argument last time. This  
16 is a gotcha moment. This is an attempt to exploit something  
17 and misappropriate for your -- for your benefit. It's  
18 completely -- it's completely bogus. Your argument makes no  
19 sense.

20 So with that, what can you tell me to convince me  
21 otherwise?

22 MR. JACKSON: Well, I can tell you that at least  
23 one Court's disagreed with that and one Court has ruled --

24 THE COURT: There's no rule that has --

25 MR. JACKSON: -- the cornerstone of this ruling --

1 THE COURT: -- ever -- there is -- there is no  
2 Court that has ever had the opportunity to rule on a  
3 situation like this. There is no precedent that actually  
4 applies here. So you're right. You have to look at the  
5 Bankruptcy Code. And if you look at the Bankruptcy Code I  
6 would like your best argument as to how it actually applies  
7 to this fact pattern.

8 MR. JACKSON: Well, let's look at the rules, since  
9 that's something that counsel has proposed as illustrative  
10 of what 502(j) means.

11 Now counsel indicated that there is no bankruptcy  
12 rule apart from Rule 3008 that could possibly implement  
13 502(j) of the code, and because Rule 3008 explicitly refers  
14 to an order, so the argument goes, then 502(j) must be  
15 cabined by that and must be limited to orders.

16 Under the Bankruptcy Rules, that's not true.  
17 Bankruptcy Rule 9024 by its express terms applies to  
18 reconsideration requests as well. 9024 implicates --  
19 imparts into the bankruptcy context Rule 60 of the Federal  
20 Rules of Civil Procedure. Rule 60, in turn, provides for  
21 relief from final orders, judgments or proceedings. That's  
22 broader than orders.

23 Rule 9024, to the extent there's any doubt that  
24 9024 and Rule 60 apply to reconsideration under 502(j), 9024  
25 includes a caveat saying that Rule 60 applies in bankruptcy.

1       However, the timing limitation set forth in Rule 60 with  
2       respect to certain kind of reconsideration does not apply to  
3       the reconsideration of a claim -- the reconsideration of an  
4       order allowing a claim.

5               So 9024 by its own terms also governs.

6               Rule 3008 isn't the only thing that governs a  
7       502(j) reconsideration. 9024 and the timing considerations  
8       of Rule 60 apply, and there's case law certainly applying  
9       9024, and I believe some of it is cited in Lehman's briefs,  
10      applying 9024 in the context, not precisely the context that  
11      we have here, of course, but applying it.

12              So if -- if 502(j) is implicated, it's actually  
13      implemented by two different rules of the Bankruptcy Code.

14              THE COURT: Can we -- can we agree on something  
15      now? First of all, I didn't follow your argument very well.  
16      You threw out a lot of numbers very fastly (sic), but we  
17      didn't actually apply those rules and what they stand for to  
18      the facts that are before the Court.

19              The circumstance before me, as I understand it, is  
20      that your client relies upon a certain notice for the  
21      proposition that by virtue of having received the notice  
22      there was effectively a waiver of any late-filed claim  
23      status applicable to your client's claim, and that that's  
24      the gotcha moment. You are, in effect, seeking to exploit  
25      the fact that your client received a notification -- whether

1 it did anything or not with respect to the notification  
2 almost doesn't matter. But you're treating that as  
3 effectively reconsideration of the claim. Do I understand  
4 that right?

5 MR. JACKSON: No. I -- I think maybe I can  
6 explain it better, Your Honor, if you would allow me to  
7 explain the case that we cite that we believe --

8 THE COURT: I don't want to hear --

9 MR. JACKSON: -- is the only thing --

10 THE COURT: -- about the case.

11 MR. JACKSON: It's actually an analysis --

12 THE COURT: I don't want to hear about the case.  
13 I want to hear about this case.

14 MR. JACKSON: Okay.

15 THE COURT: I don't want to hear about the  
16 precedents you've cited because I view it as largely  
17 inapplicable. I want to deal with the situation that's  
18 completely one-off. We're going to decide this question as  
19 if there's no authority. We're just dealing with the code  
20 and the rules --

21 MR. JACKSON: Okay.

22 THE COURT: -- and the facts as they exist.

23 MR. JACKSON: Understood, Your Honor. And I  
24 apologize. I -- as I'll get to the -- the case actually  
25 bears this out, but let me just skip the case. Let's go to

1 the --

2 THE COURT: Don't even mention --

3 MR. JACKSON: Tennessee --

4 THE COURT: Don't even mention the case.

5 MR. JACKSON: There was --

6 THE COURT: I don't want to hear about any case  
7 from Tennessee right now.

8 MR. JACKSON: Okay. There was a claim filed.  
9 There was an objection -- the claim was deemed allowed until  
10 an objection was filed. There was an objection filed.  
11 There was a response to the objection contesting the basis  
12 of the objection asserting excusable neglect as a grounds  
13 for late filing the claim.

14 While this process was playing itself out --

15 THE COURT: And remind me, what was the excusable  
16 neglect here?

17 MR. JACKSON: There was some confusion on -- as to  
18 the coordinating proceedings in Europe as to notices that  
19 were received from the European administrator about the  
20 necessity or non-necessity of filing a claim in the Lehman  
21 case in America on behalf of the guarantees of these certain  
22 securities. So --

23 THE COURT: A circumstance that I previously ruled  
24 in other settings does not constitute excusable neglect.

25 MR. JACKSON: And, Your Honor, we'll -- we'll rest

1 on the papers on that point.

2 But while there was an objection, there was a  
3 response. There was a contested matter about my client's  
4 claim. At the same time as this contested matter was  
5 pending, Lehman was putting forward this estimation or -- or  
6 rather this liquidation protocol, under Rule 9019(b) and --  
7 and in the context of that motion they said, we haven't had  
8 time to review all of the claims that are potentially  
9 subject to this protocol. So with that in mind, we would  
10 like to reserve rights. They said that in the motion. They  
11 put in a reservation of rights in the order. We weren't a  
12 party to the motion, but that was the justification for it  
13 at the time.

14 Now my client actually doesn't really fit that  
15 bill in the sense that at the time Lehman sent out the claim  
16 notices, pursuant to the 9019 order that was entered by the  
17 Court, and notices that were approved in form by this Court  
18 in the 9019 order, there was already a contested matter with  
19 respect to our claim. The notice that we received said,  
20 there was an order entered by the Court under Rule 9019  
21 allowing us to resolve amounts of claims pursuant to this  
22 process. Here's your claim. If you don't agree with this  
23 claim, here are the things you can do. If you don't  
24 disagree with this claim, you don't have to do anything and  
25 your claim will be allowed for purposes of voting in

1 distribution on the plan.

2 In receipt of that notice, we didn't disagree with  
3 the amount so we didn't do anything.

4 THE COURT: Now did you -- did -- did -- when I  
5 say "you," did your client assume -- and do you know this  
6 for a fact -- that as a result of receiving this notice that  
7 went out to some 21,000 parties in order to deal with plan  
8 voting and provisional allowance, that notwithstanding the  
9 fact that there was a contested matter with respect to a  
10 late-filed claim that that constituted a knowing waiver on  
11 the part of Lehman with respect to all issues with respect  
12 to your claim?

13 MR. JACKSON: I don't think waiver is what I would  
14 use to describe it. I don't think we have described it as  
15 that technically. What I'm saying is that the claim was  
16 allowed on October 21st --

17 THE COURT: And -- and have -- and what is it --  
18 what is it about the piece of paper that constituted  
19 allowance of the claim?

20 MR. JACKSON: Well, it was the combination of the  
21 piece of paper with the Court's 9019 order. The order said,  
22 I'm hereby approving under 9019(b), I'm approving a class of  
23 controversies that the debtor is allowed to resolve by means  
24 of this notice process. I'm approving the form of notice,  
25 which says in it, if you don't disagree with the proposed

1 amount, your claim will be allowed.

2 THE COURT: But there was a reservation built into  
3 the order.

4 MR. JACKSON: Yeah. And I think that's really  
5 what this turns on, Your Honor, is what is the effect of a  
6 reservation. And my point is -- isn't really that there was  
7 a waiver so much as procedurally, the way this played out,  
8 there was a contested matter. There was an order under 9019  
9 resolving the claim. The order was -- the effect of the  
10 notice followed by my client's non-response to the notice in  
11 conjunction with the procedure that Your Honor had approved  
12 in the 9019 order resulted in the allowance of my client's  
13 claim.

14 THE COURT: Okay. Now that I understand that  
15 that's your position --

16 MR. JACKSON: Right.

17 THE COURT: -- look at 502(j) and tell me how that  
18 applies to it.

19 MR. JACKSON: It applies because there was a  
20 process -- and I think Rule 9024 is helpful here and Rule 60  
21 is helpful here. There was a proceeding that was set in  
22 motion by the debtors in the context of their motion under  
23 9019(b) and the proceeding was actually, I guess you could  
24 say three parts. The Court approved conceptually the  
25 debtors' resolution of a class of controversies subject, of

1 course, to a reservation of rights in the order, which I can  
2 talk about, but just I'll tell you what our argument is.

3 THE COURT: But that resolution --

4 MR. JACKSON: There was a notice --

5 THE COURT: -- that resolution was not about claim  
6 allowance. That resolution was about numbers. It was about  
7 a formula to determine what the numbers would be for  
8 purposes of plan voting and distribution. It did not trump  
9 the proof of claim process, the claim allowance process, or,  
10 frankly, the claim objection process that we're in right now  
11 and it included a full reservation of rights.

12 So I don't get your argument.

13 MR. JACKSON: I guess it centers upon what is a  
14 reservation of rights, Your Honor.

15 You can reserve a right that you have. Our  
16 position is, and -- and, you know, it -- I guess it's a  
17 thumbs up or a thumbs down for Your Honor to either accept  
18 it or not, is that if -- once a claim is allowed, then we're  
19 in 502(j) territory. Now there may be grounds to -- you  
20 know, it -- it may well be that the objection could  
21 constitute, provided that the other procedures were complied  
22 with, that the objection could constitute grounds for  
23 reconsideration.

24 But our -- our position is that once a claim is  
25 allowed after its been contested, that was a proceeding that

1       resulted in the allowance of a claim and a reservation of  
2       rights can only reserve whatever right at that time that  
3       Lehman had. And our position is that that right that they  
4       had was to seek reconsideration of the claim if any of the  
5       circumstances that they outline in their motion came to be -  
6       - that they hadn't had time to review at the time that they  
7       sent out the claim allowance, that they later determined  
8       that there were grounds to object, so be it -- but we're now  
9       in a proceeding that's governed by 502(j) --

10               THE COURT: Well, let's -- let's stop there for a  
11       second. It's your position that even though you had a late-  
12       filed claim so it wasn't allowed. It couldn't be at the  
13       time of filing. It was late, right?

14               MR. JACKSON: Well, they're deemed allowed by the  
15       code until an objection is filed, but Your Honor --

16               THE COURT: Well, there's an objection.

17               MR. JACKSON: -- in the plan --

18               THE COURT: There's an objection.

19               MR. JACKSON: There was an objection.

20               THE COURT: There's an objection.

21               MR. JACKSON: At the time it was filed it was  
22       allowed.

23               THE COURT: There's an objection.

24               MR. JACKSON: Right.

25               THE COURT: It's not --

1 MR. JACKSON: Right.

2 THE COURT: It's not a problem until there's an  
3 objection. But issue was joined, late-filed claim,  
4 objection. What is the event that constitutes allowance of  
5 that claim? Is it really the notice?

6 MR. JACKSON: It's the notice which was issued  
7 pursuant to the 9019 order and the 9019 order says that if  
8 the claim is --

9 THE COURT: But --

10 MR. JACKSON: -- allowed in accordance with this,  
11 then the claims register will be adjusted and the claim is  
12 allowed, subject to the reservation --

13 THE COURT: But --

14 MR. JACKSON: -- of rights.

15 THE COURT: But it's pretty clear, since I was  
16 around at the time, that the purpose of this highly unusual  
17 procedure -- for which there is absolutely no applicable  
18 precedent out there, whether it's from Tennessee or the  
19 Supreme Court, there is no applicable precedent that deals  
20 with this particular fact pattern. It has never happened  
21 before and it may never happen again.

22 The notice that went out was intended to deal with  
23 the particular circumstances of Lehman Program Securities  
24 and the valuation of these claims for purposes of voting and  
25 distribution, if nobody objects. It was about a formula

1 that was being applied with the hope that that formula would  
2 stick. It wasn't about dealing with particularized claim  
3 issues, and it included a reservation of rights to protect  
4 against an argument being made just like this.

5 The reservation of rights in the order was  
6 designed to prevent advocates from coming in and saying what  
7 I said last time, gotcha. You sent out a piece of paper  
8 that somehow estops you from taking a position that my  
9 client is invalid. That never happened. It never happened  
10 because the origin of the notice was the order and the order  
11 included a reservation of rights.

12 So it's in that setting that I'm having a great  
13 deal of trouble understanding your 502(j) argument. Is it  
14 correct that 502(j) only applies here if I were to accept  
15 the notion that the notice that we're talking about is an  
16 instrument pursuant to which your claim, previously the  
17 subject of a contested matter, was allowed?

18 MR. JACKSON: I think that's fair, Your Honor.  
19 And to clarify, it was never our intention to suggest that  
20 the very base level deemed allowance under 502(a) that  
21 happens the moment you file a proof of claim triggers the  
22 reconsideration rubric. That's not -- that's -- I  
23 understand that's the Herrera case that was cited by Lehman.  
24 That's what that Court concluded. That's not what we're  
25 arguing. That's actually not what the Yancey court held.

1 But, yes. That -- that's true. We're -- we're  
2 not saying that simply filing the proof of claim means that  
3 there's a one-year limitation on, you know, when the -- a  
4 claim objection has to be filed. This is really related to  
5 the precise circumstances of our claim, which is that there  
6 was a fully teed up contested matter in place at the time  
7 that then an action was taken by Lehman, which at least on  
8 its face -- Your Honor, of course, is telling me that's not  
9 what the intent was, but at least on the face of the notice  
10 that we received said your claim is allowed for purposes of  
11 voting and distribution, which coincidentally are the only  
12 two purposes we care to -- that that's allowance as far as  
13 we're concerned. That's -- that's why we filed a claim.

14 So if there was -- there was no reservation in the  
15 notice. I could tell you anecdotally that this type of  
16 procedure by which you kind of throw out a proposed  
17 valuation mechanic and then hope that people subscribe to it  
18 is done in other context. It is rare, but we've done it in  
19 the context of a plan, and for what it's worth when we did  
20 it we -- the reservations that were built into it were also  
21 included in the notice. I mean, it was -- it was a little  
22 strange that -- to learn after receiving the notice saying,  
23 don't do anything and your claim will be allowed, you think  
24 great, then to learn late -- you know, as we develop in  
25 further briefing that there's a reservation of rights in the

1 order that was -- we weren't served with.

2 THE COURT: Well, I -- I don't think you did  
3 anything in reliance on the notice, but I want to ask you  
4 this question.

5 Would you be asserting the same position today if  
6 the notice included anywhere in it a reference to a  
7 reservation of rights?

8 MR. JACKSON: I guess the issue of what a  
9 reservation means is -- would still be live? The issue of  
10 --

11 THE COURT: Well, let's just say -- let's just say  
12 the notice said, this notice is being sent out because we're  
13 dealing with this massive case administration problem in  
14 Lehman Brothers and the best way for us to do it is to send  
15 out a notice that gives a variety of parties in interest,  
16 including you if you receive this notice, notice of how we  
17 plan to value your claims for purposes of distribution and  
18 voting. But recognize something -- it's bold -- recognize  
19 something --

20 (Laughter)

21 THE COURT: -- we reserve all of our rights with  
22 respect to the ultimate allowance of your claim. And by the  
23 way, if you have at the moment that you receive this notice  
24 that we're currently objecting to your claim, we really mean  
25 it.

1           Let's just say it said that. Would you be able to  
2           make the argument you're now making?

3           MR. JACKSON: It would be different, Your Honor,  
4           but I think even there it's -- again, in my experience, for  
5           what it's worth, this type of process, if it was supposed to  
6           be for the purpose of case administration estimating for  
7           voting purposes would be a 3018 -- Rule 3018 and 502(c)  
8           motion with reservations. It was a little odd that it was  
9           styled as a 9019 settlement of a class of controversies.

10          But Your Honor's point is taken. I understand.  
11          And to the extent that the contents of the notice and the  
12          lack of the reservation of the rights in the notice is at  
13          issue, that would change things. But, really, the only  
14          reason we raised that was because our general position on a  
15          reservation of rights is that it can only reserve whatever  
16          rights exist. Our argument is that once a claim is allowed  
17          the only right to challenge it that exists is under 502(j).

18          So even a provision of an order saying, the right  
19          to object is reserved, is legally no different from  
20          somebody, for example, in their answer to a complaint  
21          reserving the right to assert additional affirmative  
22          defenses. That -- they have that right to the extent they  
23          can otherwise satisfy the requirements for amending their  
24          answer.

25          And it -- that's the proposition that I'm citing

1 the notice for was that Lehman is suggesting that to the  
2 extent they obtained affirmative relief in the form of this  
3 reservation of rights, which I don't think is what it did,  
4 that any affirmative relief would have had to go out on  
5 notice to us. So it's somewhat of a side show what the  
6 contents of the notice were. Our general position is that  
7 once a claim is allowed, and this claim was allowed because  
8 that's what the court order said, then you're in 502(j)  
9 territory.

10 And, again, there -- we have a case that cites --  
11 that supports this in a much different context, but in the  
12 absence of anything and where we have warring Chapter 13  
13 cases, we have one going our way. They have one going their  
14 way.

15 THE COURT: Okay. Thank you very much.

16 MR. JACKSON: Thank you.

17 THE COURT: Is there anything more?

18 I would like to commend both of the attorneys who  
19 argued, and I think that counsel for CF Midas had a harder  
20 argument to be sure.

21 (Laughter)

22 THE COURT: I don't see 502(j) being implicated  
23 here and I've -- I think I've made myself fairly clear in  
24 colloquy. I don't think it's implicated by, in effect, a  
25 lying in wait strategy, which is what we have here.

1 The notice might have been better in terms of  
2 including a conspicuous reference to reserved rights. But I  
3 also distinctly remember the extraordinary pressure that all  
4 parties were under during the period leading up to  
5 confirmation in 2011.

6 The case administration and case management  
7 challenges associated with the Lehman Brothers' plan process  
8 really are unprecedented situations and it's one of the  
9 reasons, I suppose, that I have resisted looking to Chapter  
10 13 authority for guidance here. That's not to say that  
11 Chapter 13 authority can't be very good precedent in the  
12 right case.

13 I view the situation as it developed that led to  
14 the notice that is the subject of the current discussion to  
15 be unprecedented. And that's true even if you can identify  
16 other situations where notices have gone out in a Chapter 11  
17 context to deal with valuation type questions or numerical  
18 questions when it comes to plan voting.

19 One of the reasons that this is unique, at least  
20 as I recall the situation and participated in the process of  
21 developing the protocol, we were dealing with countless  
22 difficult to value highly structured securities. In that  
23 setting, there needed to be a mechanism for determining  
24 relatively crisply whether particular holders would be able  
25 to vote a claim in a particular amount. It was in that

1 setting that parties negotiated and ultimately agreed on a  
2 methodology for determining how to value these structured  
3 securities.

4 Putting that into words and providing tens of  
5 thousands of claimants with adequate notice so they would  
6 understand what had occurred and have an opportunity to make  
7 a judgment whether to accept or opt out of the calculation,  
8 that is what this was about.

9 I have jokingly described language that might have  
10 been in the notice that would be a more conspicuous  
11 reference to reserving rights in that notice. But the  
12 notice is simply a creature of the order that approved the  
13 process. The order included a conspicuous reservation of  
14 rights. It was clear that the debtor, by virtue of dealing  
15 with claim amounts, was not at the same time giving up any  
16 rights with respect to entitlement to assert a claim in the  
17 first instance. And that is what is critical and clear  
18 here.

19 The notice did not constitute deemed allowance of  
20 the claim or express allowance of the claim for purposes of  
21 overriding existing objections such as the objection that  
22 affected CF Midas, nor did it, for that matter, affect a  
23 waiver or release or any other loss of rights on the part of  
24 Lehman Brothers with respect to any other claim that was the  
25 subject of the notice.

1                   Accordingly, I find the 502(j) argument  
2                   unavailing. I appreciate the supplemental briefing and the  
3                   argument with respect to the issue, but now that the point  
4                   has been clarified, I don't find excusable neglect either  
5                   with respect to the CF Midas claims. And you can refer to  
6                   an earlier decision of the Court that deals with claim  
7                   allowance issues for that proposition.

8                   And now we'll move on to the next agenda item.

9                   Thank you very much.

10                  MR. GEOGHAN: Thank you, Your Honor.

11                  MS. MARCUS: Jacqueline Marcus, again, Your Honor,  
12                  for Lehman Brothers Holdings, Inc., and its affiliated  
13                  debtors.

14                  Before I get started, Your Honor, I am mindful of  
15                  the time. This one is going to take a little bit of time.  
16                  We've prepared now twice for this hearing: Once the day of  
17                  the power outage and, again, we definitely want to go  
18                  forward, but I don't know what Your Honor has in mind in  
19                  terms of lunch and the 2:00 --

20                  THE COURT: Can you give me --

21                  MS. MARCUS: -- calendar.

22                  THE COURT: Here -- can you give me a time  
23                  estimate? Here's my problem. I have a 2:00 involving the  
24                  JPMorgan Chase litigation, and I have a 3:15 telephonic  
25                  conference, and I have a class that I'm teaching this

1 evening. So this is not a great day for me.

2 I might suggest -- I don't know how long you're  
3 going to be. I would like an estimate.

4 MS. MARCUS: Sure.

5 THE COURT: But I might suggest that we could  
6 perhaps break for lunch, come back -- because I am going to  
7 need to break for lunch -- come back at say 1:15, which is a  
8 half-hour from now, a very quick lunch, and then go from  
9 1:15 to however long it takes and then the people who come  
10 in for the 2:00 will be in the same position that you've  
11 been in, in effect, waiting for me to deal with what's  
12 before me.

13 MS. MARCUS: That would be fine for us, Your  
14 Honor. I think -- I think my initial argument will be about  
15 20 minutes.

16 THE COURT: Let's take a half-hour recess and  
17 return at 1:15.

18 MS. MARCUS: Thank you, Your Honor.

19 THE COURT: Thank you.

20 (Recess at 12:46 p.m.)

21 THE COURT: Please be seated.

22 MS. MARCUS: Good afternoon, Your Honor.

23 Jacqueline Marcus for the Lehman estates.

24 The next item on the agenda is Item Number 9, it's  
25 the three-hundred-and-twenty-eighth omnibus objection to

1 claims, ECF Number 23 -- 29323.

2 In the omnibus objection, Lehman Brothers  
3 Holdings, Inc., as plan administrator, objected to the proof  
4 of claim filed by Spanish Broadcasting System, Inc., Claim  
5 Number 67707 in the amount of approximately \$55.5 million  
6 against Lehman Commercial Paper, Inc. The Spanish  
7 Broadcasting claim is the only unresolved claim under this  
8 omnibus objection.

9 Spanish Broadcasting filed their response to the  
10 objection dated September 13th, 2012, two declarations and  
11 with the permission of the Court, a supplemental response.

12 As a threshold matter, Your Honor, Spanish  
13 Broadcasting repeatedly points out that we filed a two-and-  
14 a-half page to its claim and implies that this was somehow  
15 improper. As the Court is aware, we have filed nearly 400  
16 omnibus claims objections in this case -- in these cases.  
17 We have followed the same procedure here as in every other  
18 omnibus where we file a brief objection and then depending  
19 on the response received, we file a more fulsome response.

20 The facts surrounding the relationship between  
21 LCPI and Spanish Broadcasting are fairly straightforward.  
22 In June of 2005, Spanish Broadcasting entered into a \$350  
23 million credit agreement pursuant to which LCPI was both the  
24 lender and the administrative agent.

25 On October 3rd, 2008, Spanish Broadcasting sought

1 to draw down the \$25 million revolver provided under the  
2 credit agreement. LCPI, as administrative agent,  
3 facilitated the funding of the draw request, but did not  
4 fund its proportionate share, which was \$10 million.  
5 Ultimately, the credit agreement was terminated by a payoff  
6 letter dated February 7th, 2012, when replacement financing  
7 was provided and all of the lenders under the facility were  
8 paid off.

9 Spanish Broadcasting's claim asserts approximately  
10 \$55 million in damages arising from LCPI's breach of the  
11 credit agreement comprised of the following components:

12 \$39.6 million reflecting "the expected loss in  
13 total invested capital versus the actual decline in TIC that  
14 Spanish Broadcasting experienced;

15 "Approximately \$9.9 million in settlement amounts  
16 that Spanish Broadcasting was obligated to pay Lehman  
17 Brothers Special Financing, Inc. under a swap which  
18 allegedly exceeds the amount Spanish Broadcasting would have  
19 been obligated to pay if it had terminated the swap on  
20 October 3rd, 2008;

21 "Approximately \$5.7 million representing Spanish  
22 Broadcasting's costs to replace LCPI's 10 million unfunded  
23 share of the revolver; and

24 "Approximately \$273,000 in financing and unfunded  
25 revolver fees paid to LCPI for its loan commitment."

1 In its objection to the claim, LCPI made the  
2 following arguments:

3 First, that the damages related to the alleged  
4 decline in total invested capital and the swap termination  
5 are consequential damages, the recovery of which is  
6 precluded by the waiver of consequential damages contained  
7 in Section 10.12 of the credit agreement.

8 Second, Spanish Broadcasting has not provided any  
9 proof that it actually obtained replacement financing, let  
10 alone that it incurred almost \$6 million in incremental  
11 costs.

12 And, third, that LCPI earned the commitment fees  
13 and the financing fees as a result of its performance under  
14 the terms of the credit agreement from June 2005 to  
15 September 2008.

16 Under the claims procedures approved by the Court,  
17 this hearing is in the nature of a sufficiency hearing.  
18 However, the characterization of the hearing as a  
19 sufficiency hearing does not prevent the Court from ruling  
20 on several important legal issues.

21 First, Your Honor, Spanish Broadcasting has failed  
22 to respond to LCPI's objection regarding the alleged  
23 replacement capital damages in the amount of 5.7 million.  
24 In its response, Spanish Broadcasting has actually listed  
25 only three categories of damages, completely omitting any

1 reference to the alleged replacement capital damages. You  
2 can look at the -- at the objection, paragraph 7, for that.

3 In the declaration of Joseph A. Garcia, filed on  
4 January 29th, Mr. Garcia acknowledges in paragraph 11 that  
5 financing -- that replacement financing was not, in fact,  
6 obtained. It appears, therefore, that what looked like  
7 itemized damages set forth in the proof of claim for the  
8 cost of replacement financing were not actual damages at  
9 all.

10 Consequently, the Court should disallow the 5.7  
11 million of the Spanish Broadcasting claim today.

12 The second issue, Your Honor, is that the waiver  
13 of consequential damages is enforceable. As set forth in  
14 our reply, under New York law absent bankruptcy waivers of  
15 consequential damages are generally enforceable. It doesn't  
16 appear that Spanish Broadcasting disputes that point. So in  
17 light of the time I certainly won't belabor that issue now.

18 In its objection, Spanish Broadcasting sought to  
19 avoid the effect of the waiver by arguing that the credit  
20 agreement was rejected and, therefore, the waiver of  
21 consequential damages is effective -- is ineffective, excuse  
22 me.

23 That argument now seems to be off the table as a  
24 result of the debtors' explanation that the credit agreement  
25 was not, in fact, rejected. Now in its own gotcha moment,

1 Spanish Broadcasting seeks to find another reason why the  
2 clear language of the consequential damages waiver should  
3 not be enforced. Its latest argument is that the waiver did  
4 not survive the termination of the credit agreement.

5 Now, Your Honor, think about what Spanish  
6 Broadcasting is arguing here. It's claiming that in  
7 calculating the damages occasioned by a breach that  
8 allegedly occurred in October of 2008 before the contract  
9 was terminated, the Court may not take into account the  
10 provisions of the credit agreement as it existed at that  
11 time. In essence, Spanish Broadcasting has argued that it  
12 can rely on the terms of the contract to establish LCPI has  
13 liability, but LCPI can't rely on the terms of the contract  
14 to contest the magnitude of the damages.

15 Not only would such a result be inequitable and  
16 incorrect, but it is also not supported by the cases cited  
17 by Spanish Broadcasting in support of its position.  
18 Specifically, in the Azcap (ph) case cited, Azcap was  
19 seeking to establish that a contract term that limited the  
20 amount of license fees that certain radio stations could  
21 seek would apply with respect to the period subsequent to  
22 the -- to the termination of the agreement. Those are not  
23 the facts here.

24 The Scientific Component case also cited by  
25 Spanish Broadcasting is equally unavailing. That case

1 involved a review of a decision of an arbitration panel.  
2 The terminated contract at issue had both an arbitration  
3 clause and a waiver of consequential damages. The  
4 arbitration panel failed to give effect to the waiver of  
5 consequential damages. The District Court began its  
6 decision by noting that, "An arbitration award is subject to  
7 very limited review." That's at page 5 of the SLIP (sic)  
8 opinion. The Court went on to hold, and I quote, "It is not  
9 up to this Court to second guess the panel's interpretation  
10 of the supply agreement, but only to determine if it had the  
11 authority to do so. Because of the broad arbitration  
12 clause, the panel had the authority." That's at page 9 of  
13 the opinion.

14 For Spanish Broadcasting, therefore, to cite this  
15 case as authority for the proposition that termination of  
16 the credit agreement nullified the consequential damages  
17 waiver is disingenuous at best.

18 More pertinent are the authorities that we've  
19 found that stand for the opposite preposition. And Your  
20 Honor, to the extent you would like them, we have copies of  
21 the decision for -- the decisions for you.

22 In Rensselaer (ph) Polytechnic Institute versus  
23 Varian at 340 F. Appex. 747 (2nd Cir. 2009) is a case in  
24 which the relevant contract had been terminated. The  
25 contract included a waiver of consequential damages.

1 Despite the termination of the contract, the Second Circuit  
2 remanded the matter back to the trial court for a  
3 determination of whether the damages sought were direct or  
4 consequential damages and, thus, whether they were  
5 permissible under the contract.

6 In G.V. Trademark Investments, Ltd. versus Gemini  
7 Shirtmakers, Inc. -- that's at 1999 Westlaw 61808 -- the  
8 Southern District of New York held that the plaintiff did  
9 not forfeit its rights to sue for money owed under a  
10 contract even though there was no explicit provision for  
11 survival of the provision providing for guaranteed payments.

12 In the landlord-tenant arena, the appellate  
13 division in New York has held that a waiver of consequential  
14 damages is enforceable despite the termination of a lease.  
15 That was in 124 Intogo Corp. versus Roundabout Theater  
16 Company. I have the cite, but it looks like I transcribed  
17 it wrong. I can provide it later.

18 THE COURT: Okay.

19 MS. MARCUS: In addition, Your Honor, in the  
20 WorldCom case in resolving a dispute involving a contract  
21 governed by Arizona law, Judge Gonzalez granted the debtors'  
22 motion for summary judgment and found that the contractual  
23 limitation of liability clause was effective,  
24 notwithstanding that the contract had been terminated.  
25 That's at 368 B.R. 308.

1 THE COURT: Well, here's my understanding of  
2 Spanish Broadcasting's argument on this point, and they can  
3 obviously speak for themselves at the right time.

4 I think they take the position that because the  
5 agreement that was executed at the time of termination  
6 included a provision that certain specified terms of the  
7 contract survived --

8 MS. MARCUS: Uh-huh.

9 THE COURT: -- and that this was not one of them,  
10 that this may be one of those situations where, by virtue of  
11 not specifically referencing the continuation in perpetuity  
12 of the waiver of consequential damages that they can now  
13 assert that they're in a better position now as a result of  
14 termination than if the contract had been in effect.

15 MS. MARCUS: That is what they're arguing, Your  
16 Honor, or that's how I understand their argument as well.  
17 And I actually -- your -- your question is timely because I  
18 was going to get to another decision where the effect of a  
19 survival clause I thought was -- it was very cogently  
20 explained. It was by the Bankruptcy Court in the District  
21 of Columbia Circuit in a case called, In re: Ardent, Inc.,  
22 305 BK 133.

23 There, there was a contractual provision that  
24 provided the claimant would earn its full fee  
25 notwithstanding termination of the agreement and the debtor

1 argued, much like Spanish Broadcasting argues, that because  
2 the provision wasn't covered by the survival provision it  
3 had no effect after termination of the agreement. And the  
4 Court held as follows:

5 "The agreement elsewhere explicitly states that  
6 certain obligations are to by the termination of the  
7 agreement" -- I'm going to skip a little bit and continue  
8 with the quote -- "However, this simply makes clear that the  
9 parties remain subject to such obligations and are required  
10 to perform them, including the party not in default who  
11 generally is excused from future performance, but not as to  
12 promises of confidentiality which implicitly survived  
13 termination.

14 "It relates, in other words, to a matter,  
15 confidentiality, whose survival the parties might want to  
16 make explicit instead of implicit. It does not purport to  
17 address an issue of damages upon termination. The wholly  
18 different issue that the claim presents as to which there  
19 would be no date -- doubt that damage claims survive,  
20 including the claim for the unperformed promise of paying  
21 the access fee."

22 That's at 305 B.R. 137. And just to relate that  
23 to our case, here there were provisions in that notice of  
24 termination that were -- that's -- the notice of termination  
25 indicated certain contractual provisions that survive in

1 case there was any doubt about that. But the fact that they  
2 permitted or specifically excluded the claim from the  
3 release has to mean that -- that Lehman had the ability to  
4 defend itself from that claim. Any other -- any other  
5 interpretation really wouldn't make any sense.

6 The next issue, Your Honor, is that Spanish  
7 Broadcasting contends that if the waiver is enforceable,  
8 then the credit agreement would "fail of its essential  
9 purpose." Failure of essential purpose, Your Honor, is a  
10 concept found in Article 2 of the Uniform Commercial Code  
11 that has no applicability to the credit agreement.

12 Spanish Broadcasting points to Judge Gonzalez's  
13 decision in Enron as support, but that case is markedly  
14 different. There, Judge Gonzalez held that because the  
15 underlying contract was for a sale of good and because no  
16 one contested the applicability of the UCC, he would apply  
17 the UCC to the dispute.

18 Here, in contrast, there's no argument that the  
19 credit agreement is governed by the UCC and, therefore, the  
20 argument should be rejected.

21 Moreover, even if the principle were to apply,  
22 there hasn't been a failure of essential purpose. Spanish  
23 Broadcasting had an ample remedy under the contract to sue  
24 for direct damages. What happened here, however, is that  
25 Spanish Broadcasting did not suffer any legally cognizable

1 damages. There's no basis for the -- therefore, for the  
2 Court to disregard the waiver of consequential damages here.

3 The next argument has to do with the nature of the  
4 damages themselves and whether they are consequential or  
5 direct damages.

6 As we've cited in our papers, New York Courts have  
7 held that the measure of direct damages in the case of a  
8 breach of a contract to loan money is the incremental cost  
9 of any replacement financing, and we cite for that  
10 proposition Avalon Construction Corp. versus Kirsch Holding,  
11 256 N.Y. 137.

12 Spanish Broadcasting contends in its supplemental  
13 papers that it is black letter law that the measure of  
14 damages may be greater than the incremental cost of  
15 replacement financing if no replacement financing is  
16 available.

17 There are several problems with Spanish  
18 Broadcasting's position:

19 First, the declaration of Joseph A. Garcia states,  
20 not that no alternate financing was available, but that  
21 "based on our understanding of the financial markets at the  
22 time of the credit crisis and Lehman's bankruptcy filing, we  
23 recognized that alternative" -- excuse me -- "that alternate  
24 financing simply was not an option." That's at paragraph  
25 11.

1 Second, the full quote from the authority cited by  
2 Spanish Broadcasting for the black letter law provides as  
3 follows:

4 "The better rule and the one generally followed  
5 today is that for a breach of contract to lend money, the  
6 borrower can obtain judgment for damages measured by the  
7 resulting injury so far as the defendant had reason to  
8 foresee such injury when the contract was made." That's  
9 Corbin on contracts, Section 59.3.

10 Similarly, the restatement second of contract  
11 Section 351 provides, in pertinent part, "In most cases,  
12 then, the lenders' liability will be limited to the  
13 relatively small additional amount that it would ordinarily  
14 cost to get a similar loan from another lender. However, in  
15 the less common situation in which the lender has reason to  
16 foresee that the borrower will be unable to borrow elsewhere  
17 or will be delayed in borrowing elsewhere, the lender may be  
18 liable for much heavier damages."

19 There are two critical aspects to this exemption.  
20 First, the lack of alternate financing must be foreseeable  
21 and, second, foreseeability is measured at the time the  
22 contract is entered into. Thus, in order to avoid the  
23 default rule, Spanish Broadcasting would have to show that  
24 in June of 2005 when the credit agreement was entered into,  
25 Lehman had reason to foresee that the credit markets would

1 be frozen in October of 2008. None of Spanish  
2 Broadcasting's papers argue that Lehman knew or should have  
3 known in June of 2005 that alternate financing would not be  
4 available, and for obvious reasons. No one foresaw the 2008  
5 financial meltdown.

6 Thus, Spanish Broadcasting is precluded, even by  
7 the authority that it cites, from asserting that it is  
8 entitled to damages in excess of the cost of replacement  
9 financing.

10 THE COURT: Let me ask you a question. And it  
11 kind of follows from your last argument.

12 If there's a future event that is unforeseeable,  
13 does the same rule apply, and how it -- how can you hold  
14 Spanish Broadcasting to a strict test of damage calculation  
15 when in 2005, as you point out, nobody could have foreseen  
16 that the credit markets would end up frozen? And I saw in  
17 the Spanish Broadcasting papers a very enjoyable quote from  
18 my Charter decision, which I appreciated, but I also  
19 recognize that we're only talking about \$10 million here.

20 So I have actually two questions:

21 One is, does a general collapse of the credit  
22 markets represent a foreseeable event for purposes of  
23 calculating damages associated with the failure to fund;  
24 and, is it a factual question that needs to be more fully  
25 developed to determine whether or not at the relevant time

1 that LCPI failed to fund its \$10 million share it was  
2 impossible or impracticable or very difficult to replace  
3 that financing? And there may also be a related factual  
4 question, because I don't know the answer to it based upon  
5 my review of the papers, what diligent efforts did Spanish  
6 Broadcasting actually undertake to try to obtain that  
7 financing, and did it have other sources of liquidity  
8 including from investors and related parties?

9 MS. MARCUS: Okay.

10 In response to your first question, does the  
11 general collapse of the credit markets represent a  
12 foreseeable event for the calculation of damages, we submit  
13 that the answer is no. If we had foreseen what happened in  
14 2008, it probably wouldn't have happened. But --

15 THE COURT: Precisely.

16 MS. MARCUS: Right. So the test is -- you know,  
17 it's the combination, Your Honor, of the general rule on  
18 what you can recover for breach of a contract to loan money  
19 with the waiver of the consequential damages that creates  
20 the problem. And I might add even if consequential damages  
21 were available, even consequential damages have to be  
22 foreseeable.

23 But our position is that because the -- it wasn't  
24 foreseeable, and not only wasn't it foreseeable, but I think  
25 I'm answering your second question about the factual record,

1 there's no allegation that it was foreseeable in 2005, which  
2 is what the test is. Those two factors mean that the more  
3 extensive damages are not available to Spanish Broadcasting  
4 and having waived consequential damages, they waived it and  
5 they were sophisticated parties who negotiated an agreement  
6 that included the waiver. We believe that that should be  
7 enforceable.

8 As to whether the factual record needs to be more  
9 fully developed regarding whether it was, in fact,  
10 impossible to replace the financing and what efforts were  
11 undertaken, I don't believe that that -- those are relevant  
12 unless the Court determines that our argument is incorrect  
13 as to what the standard is. And if that were the case, of  
14 course we would reserve the right to develop that more --  
15 expand the factual record. But we don't think it's  
16 necessary and we think the Court can make the determination  
17 today based on what's in the record thus far.

18 The last component or the last issue, Your Honor,  
19 has to do with the alleged fee damages. There's no dispute  
20 that -- and, obviously, this is the tail wagging the dog a  
21 little bit. There's no dispute that LCPI performed the  
22 services as administrative agent and complied with all of  
23 its obligations prior to October 3rd, 2008. Nevertheless,  
24 Spanish Broadcasting has asserted a claim for all of the  
25 financing fees and unfunded revolver fees that it paid to

1 LCPI during the term of the agreement.

2 While it may not be required as a matter of law,  
3 LCPI is sympathetic to the fact that Spanish Broadcasting  
4 doesn't want to pay fees for the period after which LCPI  
5 defaulted on its funding obligation. Therefore, in our  
6 response we offered to allow Spanish Broadcasting a claim  
7 for \$13,334 which we calculate as the amount paid for the  
8 periods of September 30 and October 4th.

9 Your Honor, as I indicated --

10 THE COURT: As you -- as you say it, it doesn't  
11 seem very generous.

12 (Laughter)

13 MS. MARCUS: We're only looking out for the  
14 interest of all creditors, Your Honor.

15 THE COURT: I understand. I have a question for  
16 you about whether or not this is an outlier or whether or  
17 not this is a fact pattern and set of arguments that may  
18 flow through to other claimants in respect of unfunded  
19 commitments during the period immediately following the  
20 bankruptcy filing.

21 And I don't know if you can answer that, but I --  
22 I'm interested in knowing whether the issues that are being  
23 presented here are all by themselves or whether or not these  
24 issues tie into other potential damage claims that may be  
25 asserted against LCPI.

1 MS. MARCUS: Sure. And I think I have the -- to  
2 divide my response into two different debtors.

3 As to LCPI -- and Mr. Walsh is here, David Walsh,  
4 from Alvarez & Marsal is here in court. He's done most of  
5 the work during the case on LCPI.

6 As to LCPI, this is the only failure to fund claim  
7 that remains. There had been others made. Every single one  
8 of them has been resolved. So as to LCPI, this is an  
9 outlier as you described it.

10 As to LBHI, and I think those funding issues arise  
11 more in the real estate world, there have been a number of  
12 creditors who have raised the issues. I can think off the  
13 top of my head of two claims that were in excess of \$100  
14 million that have been settled for drastically -- and I  
15 can't emphasize that enough -- substantially less than \$100  
16 million where there were similar waivers of consequential  
17 damages.

18 So it's an issue that I think on the LBHI side may  
19 exist more than what's left on the LCPI side.

20 THE COURT: Okay.

21 MS. MARCUS: With that, Your Honor, I -- I reserve  
22 the right to -- to respond to Spanish Broadcasting's  
23 argument. But as I indicated, if the Court were to  
24 determine that the damages asserted are direct damages or  
25 that the waiver of consequential damages is not enforceable,

1 then LCPI reserves its right to assert a variety of  
2 additional objections regarding causation, the actual and  
3 reasonable amount of the damages, and mitigation issues.  
4 But arguing about those things at this time doesn't seem to  
5 be a prudent way to proceed.

6 THE COURT: Fine.

7 MS. MARCUS: Thank you.

8 THE COURT: Thank you.

9 MS. PRIMOFF: Good afternoon, Your Honor. Madlyn  
10 Primoff of Kaye Scholer for Spanish Broadcasting.

11 As Your Honor knows from our papers, Spanish  
12 Broadcasting is the largest Hispanically-controlled public  
13 media and entertainment company in the United States.  
14 Lehman cites a lot of cases in its papers. We cite a lot of  
15 cases in our papers, and we've had dialogue today over some  
16 other cases.

17 And the overwhelming majority of those cases are  
18 not decided on a motion to dismiss. They're decided on a  
19 fully developed factual record either following a trial or  
20 at summary judgment.

21 THE COURT: What -- is it your position that the  
22 waiver of consequential damages issue is a subject that  
23 requires discovery, that needs to be amplified with  
24 discovery, or is it a pure legal question?

25 MS. PRIMOFF: I think the issue is plain on its

1 face and that your Court -- that Your Honor could rule in --  
2 in our favor on that issue today. But I don't think Your  
3 Honor needs to rule on that issue today because I think that  
4 the measure of damages in -- in any -- we're entitled to  
5 damages as a matter of law for their breach of the failure  
6 to fund.

7 The foreseeability of the damages, there's a  
8 discrepancy in the case law that ultimately Your Honor will  
9 need to decide whether the 2005 date that the credit  
10 agreement was entered into is the operative time period or  
11 whether the October 2008 breach is the operative time  
12 period. In either event we think -- we think it's  
13 foreseeable in both instances, obviously, clearly more so in  
14 October 2008.

15 And so either way we -- we assert that our damages  
16 are direct damages which is a question of fact under the  
17 governing legal authorities that has to be determined at  
18 trial or on a properly developed summary judgment record in  
19 any event.

20 THE COURT: When you say direct damages, are you  
21 saying that all of the damages that you assert in your claim  
22 are direct damages or are you saying that some of the  
23 damages are direct damages and some are consequential  
24 damages that have not been waived?

25 MS. PRIMOFF: And thank you for the question, Your

1 Honor.

2 On the \$5.7 million, I believe we previously  
3 communicated to Lehman that we are withdrawing that element  
4 of the claim. So that's -- that's not -- that's not an  
5 issue.

6 THE COURT: That looks like progress to me  
7 already.

8 MS. PRIMOFF: Yes.

9 THE COURT: That's good we had this hearing.

10 MS. PRIMOFF: We're -- we're trying to be  
11 constructive.

12 The total invested capital damages and the SWAP  
13 termination damages, we assert that those are direct  
14 damages. If the Court were to disagree with us and say that  
15 they're consequential damages, then our -- our position is  
16 that the consequential damages waiver is of no force or  
17 effect, so that -- so it -- it doesn't matter in the first  
18 instance. We think -- we think we get there either way,  
19 whether they're direct or consequential.

20 THE COURT: Okay.

21 MS. PRIMOFF: I mean, there's -- there's expansive  
22 case law on the distinction between -- and we've got this in  
23 our papers -- on the distinction between diminution in value  
24 damages with the -- which the case is, the Wyle (ph)  
25 article, the UCC recognizes that diminution in value damages

1 are direct damages, not consequential damages. And Capstone  
2 report -- I'm pointing at Mr. Heslen (ph) from Capstone.  
3 The Capstone report next to our proof of claim establishes,  
4 at least facially for purposes of this hearing, the  
5 diminution in value damages.

6 I just want to make sure I address the questions  
7 that Your Honor asked of Ms. Marcus.

8 We do believe that Your Honor could take judicial  
9 notice based on what was going on in the credit markets at  
10 the time about the inability, impossibility to obtain  
11 financing. We know that you heard lengthy proceedings over  
12 that in Charter. If Your Honor believes that that's an  
13 issue for trial, you know, we're prepared to --

14 THE COURT: Well, I think -- here's the issue with  
15 respect to comparing your financial plight with the record  
16 in Charter.

17 In Charter I was dealing with reinstatement of a  
18 \$12 billion credit facility and it was apparent, based on  
19 the evidence, that it was not possible to replace a \$12  
20 billion credit facility at the time.

21 MS. PRIMOFF: Uh-huh.

22 THE COURT: Here, we're talking about a \$10  
23 million base of a loan that was not funded by Lehman at the  
24 time of a draw request with respect to the entire revolver.

25 Now \$10 million is a lot of money to a lot of

1 people, but partly because of my experiences in these mega-  
2 cases that I've been working on over the years, \$10 million  
3 has begun to seem like not a lot of money. So one of the  
4 questions becomes, was it really impossible to replace the  
5 \$10 million; what efforts were undertaken to replace the \$10  
6 million; could investors have provided the \$10 million; and  
7 was there any effort to obtain alternative financing from  
8 other sources including hedgefunds, for example.

9 MS. PRIMOFF: And I believe that we have  
10 allegations to that effect in the declaration of Joseph  
11 Garcia, the chief financial officer of the company.  
12 Immediately following Lehman's breach of its obligation to  
13 fund the \$10 million, Spanish Broadcasting was downgraded by  
14 both rating agencies. The rating agencies explicitly cited  
15 the failure to fund and Spanish Broadcasting's decreased  
16 liquidity position is the reason for the downgrade.

17 So there are both subjective factors and objective  
18 factors that would come into play in -- in answering this  
19 question for Your Honor.

20 So, for example, objectively, Spanish  
21 Broadcasting's leverage ratios in September 2008 and  
22 December 2008 were 14.77 and 16.87, respectively. You know,  
23 we would put on expert testimony to demonstrate that, you  
24 know, no financial institution would make even a \$10 million  
25 loan with leverage ratios of that -- of that magnitude.

1 And as to the other sources of liquidity, again,  
2 Mr. Garcia's declaration shows that the purpose for the \$25  
3 million drawdown was to repay a loan of eighteen-and-a-half-  
4 million-dollars that was maturing in January 2009 and, in  
5 addition, to terminate its swap with Lehman which had  
6 breakage costs of \$6 million.

7 Because Lehman didn't fund the \$10 million piece,  
8 they had to -- Spanish Broadcasting had to use three-and-a-  
9 half-million-dollars of its precious liquidity to repay the  
10 eighteen-and-a-half-million-dollar obligation and that --  
11 that three-and-a-half-million then was not available for  
12 ordinary operations of the company, which caused the company  
13 to suffer.

14 THE COURT: What kind of shape is Spanish  
15 Broadcasting in today?

16 MS. PRIMOFF: It is in shaky -- it is -- it is --  
17 what kind of shape is it in today? It's a public company.  
18 Its financials are publicly available. If you look at  
19 Debtwire, it's, you know, there from time to time. It's on  
20 some people's watch list, but it's operating.

21 THE COURT: All right. Well, this alleged loss  
22 and total invested capital. I'm hard pressed to understand  
23 at what point we're measuring this and how you're able to  
24 demonstrate causation, even if you're entitled to damages,  
25 either as direct or consequential.

1 MS. PRIMOFF: What Capstone has done is it has  
2 recognized that all similarly situated media and  
3 entertainment companies at the time experienced a decline in  
4 liquidity, performance, total invested capital. And  
5 essentially the Capstone report assumes that Spanish  
6 Broadcasting should have performed the way its competitors  
7 performed at the time, as a result of the credit crisis, the  
8 recession, all of that. But that's not what the numbers  
9 show.

10 What the numbers show is that Spanish Broadcasting  
11 performed worse than that because Spanish Broadcasting was  
12 in a worse liquidity position than its competitors as a  
13 result of Lehman's failure to fund the \$10 million piece of  
14 the revolver.

15 THE COURT: Okay.

16 MS. PRIMOFF: I think otherwise our points are set  
17 forth in our papers, Your Honor, that we don't believe this  
18 is susceptible to a motion to dismiss. We believe that our  
19 claims survive a motion to dismiss, both because we assert  
20 direct damages and because the consequential damages waiver  
21 is not enforceable, and ultimately, because the question of  
22 direct versus consequential damages is a question of fact.

23 THE COURT: Okay, thank you. Is there anything  
24 more?

25 MS. MARCUS: A little bit, Your Honor.

1           Your Honor, I certainly hadn't been aware that the  
2           waiver of the \$5.7 million claim had been communicated to  
3           Lehman. I don't know if it's been communicated, but I'm  
4           happy for it, so we'll drop that.

5           THE COURT: You've already had a good day in  
6           Court.

7           MS. MARCUS: Your Honor, with respect to the  
8           diminution in value of damages as being direct damages, I  
9           won't, you know, extend this hearing any longer than it  
10          needs to be. Suffice it to say that in our reply, we  
11          distinguish those cases. They're not cases in which the  
12          contract at issue was a contract to loan money, and we  
13          believe that the cases we cited regarding the appropriate  
14          measure of damages are the appropriate ones to look at.

15          But I would like to comment partly in response to  
16          Your Honor's questions regarding Spanish Broadcasting, and  
17          the Capstone report, and the methodology because it's really  
18          important and I think that by simply reading the declaration  
19          of Mr. Garcia, the Court, if that's what you do, might have  
20          the wrong impression. Bear with me one second, I'm sorry.

21          Mr. Garcia's declaration in paragraph 5 provides  
22          "as a result of Lehman's failure to fund, S&P and Moody's  
23          both down graded Spanish Broadcasting. In doing so, they  
24          specifically cited Lehman's failure to fund as the reason  
25          for the downgrade, as well as concerns about Spanish

1 Broadcasting's liquidity position."

2 When reading of the two reports, which were  
3 attached to Mr. Otchin's declaration, reflects that  
4 Mr. Garcia's statement is only partially true. Yes, Spanish  
5 Broadcasting was downgraded by both agencies in mid-October.  
6 I find it a little bit hard to believe that a downgrade  
7 could happen that quickly if the failure to fund was  
8 October 3rd, that they downgraded them on October 14th  
9 simply for that reason.

10 Second, yes, both of them do mention LCPI's  
11 failure to fund its \$10 million commitment. But the Moody's  
12 -- the section of the Moody's report that refers to its  
13 rating rationale doesn't even mention the failure to fund.  
14 What it says instead is "Spanish Broadcasting's Caal rating  
15 reflects high leverage and negative free cash flow risk  
16 related to its 2006 launch of MegaTV, recent weaknesses and  
17 operating performance of its radio segment, lack of scale,  
18 and significant revenue concentration in the New York, Los  
19 Angeles, and Miami markets." There's more, but again, no  
20 mention of the failure to fund.

21 The S&P report likewise cites a number of factors,  
22 most prominent among them, Spanish Broadcasting's investment  
23 in MegaTV. In the outlook section of the report, S&P states  
24 "an outlook revision to stable, which we view is unlikely  
25 during the near term, would require the company to slow its

1 rate of cash usage, and reign in its increasing leverage  
2 through a debt reduction plan involving asset sales, or  
3 through earlier than an anticipated, break-even results from  
4 its MegaTV operations." No mention is made of LCPI  
5 financing its \$10 million portion of the revolver.

6 So, when Ms. Primoff described the Capstone  
7 methodology, Capstone assumed that Spanish Broadcasting is  
8 just like everybody else in this industry. I think that's a  
9 faulty premise upon which to have done the analysis. And  
10 certainly if we get that far we will want to litigate over  
11 that issue.

12 But, Your Honor, just in conclusion, we believe  
13 that the waiver of consequential damages issue is something  
14 that the Court can rule on today and should rule on today.  
15 And in light of the waiver of consequential damages, and the  
16 failure of Spanish Broadcasting to even allege that the  
17 inability of replacement financing was foreseeable by Lehman  
18 in June of 2005, we request that the Court expunge the  
19 claim. Thank you.

20 MS. PRIMOFF: Just very briefly, Your Honor, just  
21 to protect the record.

22 Looking at the two ratings reports, which are  
23 attached as Exhibits C and D to Mr. Otchin's submission, the  
24 Moody's report, Ms. Marcus is correct on rating -- what she  
25 read from rating rationale, but the paragraph directly

1 below, rating rationale specifically says in the second  
2 sentence, the inability to draw down its full \$25 million  
3 revolver, combined with continued deterioration of industry  
4 fundamentals is the reason for the draw. And there's  
5 similar language in Exhibit D, the S&P report under  
6 liquidity, where in the first sentence there, it  
7 specifically mentions the failure to fund Lehman's \$10  
8 million portion.

9 THE COURT: Okay. I can see why this is an  
10 outlier. The path to an allowed claim, whether they be  
11 direct or consequential damages in connection with this  
12 company that may well have been an outlier relative to its  
13 peers at the time of the failure to fund suggests to me that  
14 if, as in when, this ever gets to an evidentiary hearing,  
15 Spanish Broadcasting will have an extraordinarily difficult  
16 time proving causation, even if it has the right to.

17 The claims being asserted here are bloated,  
18 excessive, and probably not allowable, but I'm not ruling on  
19 that. I'm providing indication of direction to counsel.  
20 This matter should be settled, and should have been settled  
21 a while ago.

22 I am not going to rule today on the waiver of  
23 consequential damages, even though I might be able to.  
24 Giving the benefit of the doubt fully to Spanish  
25 Broadcasting, under a 12(b)(6) standard, they will get their

1 day in court, or we'll deal with this on dispositive motions  
2 after discovery.

3 I am frankly startled to be presented with an  
4 almost \$40 million claim, which is based upon an expert's  
5 report. That's not to say the report isn't correct. That's  
6 not to say the report may not be admissible. But in the  
7 fully contested setting, it may not be credible.

8 We'll see you another day. And I suggest you take  
9 to heart some of my remarks.

10 MS. MARCUS: Thank you, Your Honor. That  
11 concludes the morning half of the agenda.

12 THE COURT: Fine. We're going to take a very  
13 brief recess, five minutes, to allow those attorneys who  
14 need to enter their appearances for the afternoon hearing to  
15 do so. So, we'll take five.

16 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

17 (Recess at 2:09 p.m.)

18 THE COURT: Be seated, please. I figure if I wait  
19 long enough, somebody will talk.

20 MR. WOLINSKY: Happy to oblige, Your Honor. My  
21 name is Marc Wolinsky from Wachtell Lipton for JP Morgan.  
22 And we're here on a motion to compel an answer to an  
23 interrogatory.

24 And it's, as you know, it's taken us a long time  
25 to get here. And I remember in one of the conferences, Your

1 Honor admonished us that it better be important if you're  
2 going to make a motion. And we think it is important, and  
3 that's why we've pursued this issue as long as we have.

4 As you know, Your Honor, the core allegation in  
5 the complaint here, one of the core allegations is that JP  
6 Morgan made an arbitrary, capricious, unreasonable,  
7 unjustified request for collateral, focusing on the one on  
8 September 11th. That was their request for collateral that  
9 was focused on the -- JP Morgan's perception of the risks in  
10 the tri-party repo book. And JP Morgan believed that it was  
11 under-collateralized, asked for an additional \$5 billion in  
12 cash to collateralize its exposures, and from that request,  
13 which is the subject of litigation, there's a claim for  
14 direct damages and consequential damages.

15 So, we asked LBI -- LBHI to state whether or not  
16 there was a contemporaneous basis, not after the fact, but  
17 whether on September 11th, when the request was made,  
18 whether there was a contemporaneous basis for a belief that  
19 JP Morgan at that time was over-collateralized.

20 And after a lot of back and forth, in court and  
21 out of court, we did get an answer and it came just a few  
22 days before we were first scheduled to appear before you and  
23 LBHI said in its response that prior to LBHI's bankruptcy  
24 filing on September 15th, Lehman did not calculate the  
25 amount by which JP Morgan was over-collateralized. So,

1 they're saying there was no contemporaneous calculation of  
2 the amount of over-collateralization. And as an element of  
3 over-collateralization, you have the exposure versus the  
4 collateral itself.

5 They said that they did not calculate the  
6 collateral value of the securities that had been pledged.  
7 By collateral value, I take it they mean a treasury's face  
8 amount of a billion, I'll lend you 98 cents on the dollar  
9 against your treasury. They did not calculate the  
10 collateral value of the securities that had been pledged to  
11 JP Morgan.

12 But they did not leave it just at that. And if  
13 they had not left it just at that, we probably wouldn't be  
14 here. They went ahead and said something else. They said  
15 that while they did not value the securities for collateral  
16 purposes, there was a contemporaneous view of, and the  
17 phrase is Lehman market value. They used the phrase Lehman  
18 market value, and they've used the phrase Lehman price.  
19 That's the word they used. To which our follow up question  
20 is, okay, what do you mean by market value, what do you mean  
21 by price?

22 The view -- the Lehman market value and the price  
23 that they refer to, and that they're seeking to rely on and  
24 ultimately will seek to rely on at trial is identified in  
25 two spreadsheets, a series of spreadsheets generated every

1 day. And they directed us to a specific, identifiable group  
2 of spreadsheets that capture the Lehman market value on each  
3 of the critical days.

4 One spreadsheet is called the ALCO report, which  
5 is essentially a report of all of the assets that are  
6 pledged in tri-party repo, RACERS Security, you've heard  
7 about is on that list because RACERS was in the tri-party  
8 repo book. The entire \$5 billion of RACERS, give or take,  
9 is in that ALCO report day by day.

10 The second report that they refer this to is  
11 called the free collateral report. And in essence, the free  
12 collateral report is what it sounds like. It is a listing  
13 of all of the collateral that is not otherwise pledged out  
14 to third parties. Now, it turns out that there's slightly a  
15 misnomer there because some of the securities in the free  
16 collateral report were actually pledged to JP Morgan.

17 So, the secured -- so you have the ALCO  
18 securities --

19 THE COURT: Actually pledged to JP Morgan in the  
20 transactions that are at issue in this case? Or actually  
21 pledged to JP Morgan in the ordinary course from the  
22 beginning of time?

23 MR. WOLINSKY: What happened was, and the story is  
24 that beginning in the summer, JP Morgan was questioning  
25 whether it was adequately collateralized in the TPR pool,

1 and there were discussions between the parties, and Lehman  
2 voluntarily provide -- I think it's fair to say, they  
3 voluntarily provided -- say, look JP Morgan, we understand  
4 you're insecure --

5 THE COURT: This is before August?

6 MR. WOLINSKY: This is -- yes, before August. We  
7 call this the summer collateral. And they pledged in excess  
8 of \$5 billion face amount of securities to JP Morgan in the  
9 summer. And that summer -- what we call the summer  
10 collateral, is listed on the free collateral report.

11 THE COURT: Okay.

12 MR. WOLINSKY: Okay? And to their credit -- to my  
13 good friend's credit, they summarized the Lehman market  
14 value of the securities that we were all most interested in,  
15 in the Schedule A to the interrogatory response and if Your  
16 Honor would like, I could hand that up.

17 THE COURT: Okay.

18 MR. WOLINSKY: So, this is the schedule that they  
19 gave us.

20 Lehman market value per ALCO and free collateral  
21 reports, and just to simplify things, if we could focus on  
22 September 11th, which is the date on which the collateral  
23 request was made, you see RACERS, ALCO, which means that  
24 it's in the tri-party repo book. And on September 11th, the  
25 Lehman market value for RACERS is listed as \$5 billion -- \$5

1 billion and 7. The \$7 million there, as I understand it, is  
2 accrued interest on RACERS. So, the Lehman market value and  
3 the total face amount is \$5 million -- \$5 billion. So,  
4 they're -- on this schedule listing the Lehman market value  
5 of RACERS as \$5 billion plus accrued interest.

6 THE COURT: I have a question just so that you can  
7 orient me in the (indiscernible - 00:50:57). This document  
8 which is called Schedule A --

9 MR. WOLINSKY: Right.

10 THE COURT: Is this a schedule to another  
11 document?

12 MR. WOLINSKY: This is a schedule to the  
13 interrogatory response. And the information on the schedule  
14 is drawn from the ALCO and free collateral reports.

15 THE COURT: All right. So, do I understand then  
16 that Schedule A is the format for sharing certain  
17 information with you in accordance with your interrogatory  
18 request?

19 MR. WOLINSKY: Exactly, yes.

20 THE COURT: And presumably, the schedule was  
21 prepared by counsel for Lehman?

22 MR. WOLINSKY: Yes.

23 THE COURT: And presumably also, the information  
24 on this form has been taken from other original source  
25 materials --

1 MR. WOLINSKY: From the ALCO and free collateral  
2 reports, which are generated daily at Lehman.

3 THE COURT: And do you also have access to ALCO  
4 and free collateral reports as a result of discovery so that  
5 you can, if you choose to, validate and verify?

6 MR. WOLINSKY: Yes, we actually have. These  
7 numbers are drawn from the ALCO and free collateral reports.

8 THE COURT: Fine.

9 MR. WOLINSKY: No issue there. Okay.

10 But going down the list, I'd just like to focus  
11 you. If you see the next one after RACERS is Fenway.  
12 Fenway and RACERS actually have shared characteristics.  
13 They were both treated as commercial paper and the ratings  
14 of both RACERS and Fenway were dependent upon Lehman's own  
15 credit rating.

16 So, Lehman was pledging a security, the value of  
17 which was dependent upon Lehman's own credit rating. The  
18 credit rating went down, the value of these securities went  
19 down. So, Fenway is a second piece.

20 Now, Fenway as you see is in free collateral,  
21 that's because Fenway could not be pledged to third parties  
22 and couldn't be -- wouldn't be purchased by third parties.

23 So, going down the list, Verano, Pine, SASCO,  
24 Spruce, Kingfisher, those are additional collateral --  
25 additional securities by and large in free collateral, not

1 pledged to third parties, actually pledged to JP Morgan.

2 And just Pine, for example, I think Your Honor in the 60(b)  
3 case heard about Pine.

4 THE COURT: Yes.

5 MR. WOLINSKY: SASCO, Spruce. Some of these  
6 securities are what is known as the freedom series of  
7 securities. These are securities that immediately after  
8 Bear Stearns went down the tubes, the Federal Reserve  
9 created a program called the Primary Dealer Credit Facility,  
10 which you're familiar with. And the purpose of the PDCF was  
11 to enable broker dealers to pledge securities at the fed  
12 window.

13 Pine, Spruce, Verano, Kingfisher were securities  
14 that were created for the purpose of pledging -- being able  
15 to pledge the Fed. They were never sold to third parties  
16 and the testimony was they were never intended to be sold to  
17 third parties.

18 So, as you move across the page, if you look at  
19 the column September 11th just for ease, you see RACERS at 5  
20 billion, that's full face; Fenway at 3 billion, full face;  
21 Verano, Pine, SASCO, Spruce, Kingfisher all valued at or  
22 extremely close to full face, plus accrued interest. I  
23 think if you look at the list, the only one that is  
24 significantly discounted from face, actually none of them,  
25 Kingfisher on our records is 900 and -- some of them -- in

1 excess of face. I don't think any of them are discounted  
2 from face. They're all face plus accrued interest.

3 So, what we have here on the schedule is what --  
4 in response to our interrogatory response, these are what  
5 they say are the Lehman market value of the securities.  
6 But, Your Honor, this is the greatest hits list. This is  
7 the (indiscernible - 00:55:34). These are the securities  
8 that Lehman referred to internally as toxic.

9 These are the securities that their witnesses at  
10 deposition said couldn't be sold. There was no ready market  
11 for, were never intended to be sold in certain -- in many  
12 circumstances. So, we went back to Lehman when we got this  
13 schedule and we said --

14 THE COURT: When did you get that schedule?

15 MR. WOLINSKY: We got that schedule about --

16 UNIDENTIFIED SPEAKER: January 7th.

17 MR. WOLINSKY: -- January 7th. January 9. The  
18 beginning of January.

19 And we said, great, thanks for the schedule. We'd  
20 just like to understand one thing, when you say Lehman  
21 market value, are you saying that that is the value at which  
22 those securities could be sold in the market at the time?  
23 And if that's what your position is, if that was Lehman's,  
24 not position, if that was Lehman's contemporaneous belief  
25 that these securities could be sold in the market at that

1 time, at those prices, we now understand the basis for your  
2 claim that JP Morgan was over-collateralized.

3 There's about \$13 billion of securities on that  
4 schedule. And if it's their position, and they're going to  
5 prove at trial that yes, Lehman believed at the time that  
6 those securities really were worth \$13 billion and JP Morgan  
7 was over-collateralized and didn't need the \$5 billion  
8 because that's what we thought this stuff was worth, that's  
9 fine. We know what the target is.

10 And they'll prove however they can that this stuff  
11 really was \$13 billion and we'll call a parade of Lehman  
12 witnesses who will all say, we didn't know what it was  
13 worth, it couldn't be sold. And what will quickly happen,  
14 Your Honor, is the reason why this case hasn't settled, is  
15 because there's a significant disconnect between what we  
16 think the security -- the collateral was worth, and  
17 apparently what the other side thinks it was worth.

18 So, that was our simple question. Tell us in an  
19 interrogatory answer or with a 30(b)(6) witness what these  
20 market values represent. And this motion hasn't been  
21 resolved because the other side has not been willing to  
22 provide, to clarify what market value means in the context  
23 of this document, or provide a 30(b)(6) witness to explain  
24 what those numbers represent on the page.

25 The extent I do understand --

1 THE COURT: Can we break in and just kind of  
2 review --

3 MR. WOLINSKY: Sure.

4 THE COURT: -- where we are procedurally. This  
5 discovery dispute has had multiple phases. And it seems to  
6 me we are in a new phase now. One phase involved your  
7 firm's writing a letter suggesting a discovery conference in  
8 connection with the failure to respond to a particular  
9 interrogatory, having to do with the subject matter we've  
10 been revealing.

11 MR. WOLINSKY: Same subject matter, yes.

12 THE COURT: And that was the first of multiple  
13 conferences that took place, some on the telephone, some in  
14 person in this courtroom off the record. And during the  
15 course of those discussions at my urging, the parties  
16 endeavored to work out a stipulation that would resolve the  
17 discovery dispute and make motion practice unnecessary.  
18 Despite best efforts, that failed. And despite a further  
19 conference, that failed. And you ended up filing a motion  
20 to compel. Last month, a response came in from Lehman that  
21 included the Schedule A we have been talking about, correct?

22 So, here's my question about procedure and where  
23 we are right now. One way to view what I've just recited is  
24 that your motion to compel may be moot by virtue of the fact  
25 that Lehman answered the question. Another way to look at

1 it, which I guess is the way you're looking at it, is it's  
2 hardly moot because you're not satisfied with the answer.  
3 There may be another way to look at it, and what I want to  
4 confirm is what are we doing now procedurally, what is it  
5 that you seek, and what is the rule-based reason for seeking  
6 it?

7 MR. WOLINSKY: Okay. Your Honor, yes, we're  
8 unsatisfied with the answer. But we also believe that this  
9 is part and parcel of the original motion that we filed,  
10 because the original motion we filed sought two things. It  
11 sought to confirm something that was stated off the record  
12 on many occasions, Lehman did not do a contemporaneous  
13 valuation of the collateral -- for collateral valuation  
14 purposes. So, we were seeking to get them to commit -- the  
15 stip. that we were never able to get, we got in their  
16 response to the interrogatory, the one that they filed at  
17 the beginning of January.

18 But there was always a second prong of the motion.  
19 Because in the course of our trying to negotiate the  
20 stipulation, they said, but Lehman did have values for  
21 securities as reflected in documents that we've produced to  
22 you. And we always went back to them and said, you can't  
23 point us to a universe of 8 million documents and say, go  
24 find the answer in the 8 million documents.

25 And in the course of the discussions about the

1 stipulation, they started -- they were narrowing, and  
2 narrowing, and narrowing the universe of documents that  
3 we're referring to, but they always allowed themselves --  
4 they always said this universe of documents, and anything  
5 else we come to.

6 So, if you look back at our original motion, it  
7 said two things. It said, they should confirm in writing  
8 unequivocally that they did not value the collateral for  
9 collateral -- they did not calculate the extent to which JP  
10 Morgan was over-collateralized at the time. And you cannot  
11 just rely on the universe of documents to say, but these are  
12 what the values of the securities were.

13 So, what they did in their response to when they  
14 filed at the beginning of January is they abandoned their  
15 argument that we're going to look to a whole universe of  
16 documents. They were extremely specific about what values  
17 that they were seeking to rely on.

18 But really following up on your point, Your Honor,  
19 we remain unsatisfied with their response because they used  
20 the word market value without defining it, without  
21 explaining it.

22 THE COURT: Now, here's where I become a little  
23 persnickety.

24 In the ordinary course of discovery motion  
25 practice in this Court, there is a strong reliance upon the

1 cooperation of parties rather than defaulting to motion  
2 practice. And I recognize that you view what we're now  
3 talking about as being subsumed within your original motion  
4 to compel.

5 It is possible, however, for another observer, me,  
6 for example, to conclude that this is in effect a different  
7 motion, that you are now having received answers seeking  
8 amplification, clarification, specification with respect to  
9 the (indiscernible - 01:04:56) and presumably doing so  
10 because this is all part of an attempt on your part to gain  
11 a procedural advantage in anticipation of motion practice  
12 later in the case.

13 One of my uncertainties here, and I know you said  
14 at the outset that you were mindful of the fact that in  
15 order for you to have full credibility as you stand in front  
16 of the Court, there needs to be good cause to be taking all  
17 of our time in reference to a discovery motion.

18 Recognizing that you don't have to agree with my  
19 characterization that this might in fact be a new motion  
20 which would only be made after you had met and conferred  
21 with the other side had exhausted your efforts to work this  
22 out without having to go to the Court and having gone to a  
23 telephone conference, or other conference to get permission  
24 to file a new motion, without going down that particular  
25 path, I still need to know why this has become so critically

1 important to you and your important that we're still dealing  
2 with it so much later in the process after you have Schedule  
3 A.

4 Because Schedule A speaks to me, and I understand  
5 what it means, and I think you do too. You said so in your  
6 remarks. This has all been booked at full value, without  
7 discount.

8 MR. WOLINSKY: Your Honor, I don't want to  
9 interrupt you. May I speak?

10 THE COURT: Sure.

11 MR. WOLINSKY: Yeah. If opposing counsel stands  
12 up and says when they refer to this -- to market value on  
13 this schedule as the value at which the securities could be  
14 sold in the market at that time, and -- we'll sit down. But  
15 that is the important issue. And I don't think you're going  
16 to hear it from the other side. But let me not preview  
17 them.

18 THE COURT: Well, but before anybody previews  
19 anything, we're not talking about a different concept. The  
20 concept that we were talking about when we started this  
21 process many months ago was that JP Morgan Chase was looking  
22 for an answer to an interrogatory that, in substance, asked  
23 the question did Lehman have its own valuations for the  
24 securities in question. That's my paraphrase. Answer,  
25 Schedule A. JP Morgan's response, we're not satisfied. We

1 want to know what you mean by the term "Lehman market  
2 value." That's a different question, I think.

3 MR. WOLINSKY: Your Honor, we would not have been  
4 -- we would not be standing here today if we hadn't engaged  
5 with the other side over the past several weeks to pin down  
6 that question. But we did not get a commitment as to what  
7 the answer to what Lehman market value means since we got  
8 the schedule.

9 THE COURT: Right, you understand as a result of  
10 this colloquy why I could conclude reasonably, I think, that  
11 to be pressing motion practice with respect to what is meant  
12 by the terms, or term Lehman market value for purposes of  
13 this case, is a different question from did you do  
14 valuations. Answer, these are the valuations to the extent  
15 we can call it that because that's the answers to the  
16 interrogatory, but what meaning you can draw from that may  
17 be more nuanced. What are you really looking for?

18 MR. WOLINSKY: I'm looking for one of two things.  
19 I'm looking for representation that when they used the  
20 phrase market value, they mean it's the value at which the  
21 securities could be sold in the market at that time, or it  
22 means something else. And if it means the something else,  
23 we're trying to understand what the something else is.

24 THE COURT: Okay. Can you tell me about the  
25 efforts that you've engaged in -- to find an answer to that

1 question and why it has not been possible to get that  
2 question answered?

3 MR. WOLINSKY: Sure. Right after we got the  
4 schedule, we called the other side and asked them to explain  
5 it. We didn't get an answer. We served a 30(b)(6) notice  
6 asking them to put up a witness to explain what the  
7 schedules meant and what the market value term meant. And  
8 we've not -- we've been stiff armed on the 30(b)(6) notice.  
9 We haven't been told no, and we haven't been told yes.  
10 We've been told nothing, just that we'll get back to you.

11 THE COURT: Presumably, regardless of the answer  
12 to the question, what does the term "Lehman market value"  
13 mean, the numbers aren't changing. These numbers have been  
14 presented to you. So, to the extent that you were looking  
15 for an answer to an interrogatory that solicited internal  
16 marks at Lehman for the collateral that you're interested  
17 in, you have that, don't you?

18 MR. WOLINSKY: Well, our original request was not  
19 for their marks. Our original request was for collateral  
20 value.

21 THE COURT: Well, one of the --

22 MR. WOLINSKY: Your Honor, collateral value -- you  
23 can mark a security all you want, but that doesn't mean that  
24 that's what it's worth, and that doesn't mean what a third  
25 party would value it at for purposes of making a loan.

1 THE COURT: Well, we -- I think we end up in a  
2 very subtle zone in which very few people can have an  
3 intelligent conversation, because we get into a  
4 philosophical discussion in a sense, or maybe a  
5 macroeconomics discussion, or maybe it's a finance  
6 discussion, or maybe it's a political discussion about how  
7 do you characterize numbers that drive the U.S. economy.  
8 And to what extent are those numbers real? To what extent  
9 are they fanciful? To what extent are they conservative?  
10 To what extent are they aggressive? And I want to talk with  
11 you all about this because I think that's where this  
12 discovery seems to be heading, unless I'm missing something.

13 MR. WOLINSKY: No, I think you actually have put  
14 your finger on something very important. And yes, it's a  
15 philosophical, political, macroeconomic discussion, but in  
16 this context, in the context of this lawsuit, it's a  
17 commercial question, because every morning, as you know, JP  
18 Morgan extended on the order of 100 to 120 billion dollars  
19 of credit against securities like this, and these  
20 themselves. And every morning, JP Morgan had to ask itself,  
21 am I comfortable extending that credit against this pool of  
22 securities, knowing that at the end of the day, the  
23 overnight investors might not come back, and Lehman might go  
24 down the tubes, and I might wind up owning them.

25 And then the week that we're focusing on, that

1 theoretical question, was starting to look like a very real  
2 question. In fact, it was a very real question because in  
3 the week that we're talking about, the overnight investors  
4 were pulling back. They were pulling back not only for the  
5 esoteric stuff, and when we finally get to trial, but  
6 Fidelity and the PIMCOs of the world were pulling back on  
7 treasuries. They were not willing to enter into tri-party  
8 repos with Lehman on treasuries because of the perceived  
9 risk that Lehman would fail and the test, the way people  
10 characterized it in their testimony was headline risk. I  
11 don't want to be the guy who's left holding Lehman -- a debt  
12 to Lehman and wake up in the morning and see in the  
13 headlines that Lehman is bankrupt.

14 So, the commercial -- look, we all know what was  
15 going in the world leading up to Lehman's failure, and the  
16 kinds of excesses that were common in the market place. But  
17 as Lehman was leading towards bankruptcy, and as the  
18 headline risk moved up the charts, what JP Morgan did and  
19 obviously we think was entitled to do, was look at this list  
20 of securities and say very nice, you know, on a theoretical  
21 grid, commercial paper usually trades at 98 cents on the  
22 dollar, Lehman commercial paper 98 cents on the dollar.

23 We've marked SASCO at 100 cents on the dollar  
24 through the summer, we've made noises about SASCO, maybe  
25 it's not really worth 100 cents on the dollar.

1 But on September 11th, when the storm clouds were  
2 gathering and JP Morgan has to make a decision, am I going  
3 to lend Lehman \$100 billion tomorrow, that's no longer a  
4 macroeconomic issue, that is a hard commercial decision, and  
5 values, marks on a page are not really very relevant at that  
6 point in time. The relevant consideration at that point in  
7 time is if you wind up owning it, are you going to be able  
8 to sell it? And if you can sell it at all, what price  
9 you're going to get?

10 Which really leads into your 60(b) experience with  
11 Pine. What did Barclays think it was worth when they had --  
12 they wound up with -- was kind of the -- not humorous  
13 because it's a billion dollars, but Pine was, you know, kind  
14 of circling around, literally like musical chairs, who's  
15 going to get stuck holding Pine when the music stops.  
16 Barclays got stuck holding Pine when the music stopped,  
17 marked at a billion dollars, they looked at it and marked it  
18 down to 40 cents on the dollar, 50 cents on the dollar. And  
19 that's the commercial question -- that's the commercial  
20 issue that JP Morgan was facing on September 9, 10, 11 and  
21 12 when these collateral requests were made.

22 And that's why, Your Honor, it is an interesting  
23 theoretical question, but the answer that we're pushing for  
24 is a very important commercial question. What did Lehman  
25 think these securities could be sold for? And if they want

1 to take -- put a witness on the stand and say this stuff was  
2 worth 100 cents on the dollar, that was the market value as  
3 everybody understands the term market value to mean what you  
4 could sell it for, great. We'll know what we're shooting  
5 at. But I don't think they're going to put that witness on  
6 the stand.

7 THE COURT: Well, you know, different things are  
8 valued in different ways. And I'm actually testifying next  
9 week before a valuation task force that ABI has put together  
10 because they asked me to, and I don't know what I'm going to  
11 say. But I know enough about the subject as a result of my  
12 experiences both before I went on the bench, and  
13 particularly since, to know that it is an endless debate.  
14 So, we are not going to resolve in practical terms, the  
15 issues that we're discussing, even if you get the answer to  
16 the question, well, what do you mean by Lehman market value?  
17 But presumably you're going to get some kind of tactical  
18 advantage as a result of that answer because you'll be able  
19 to do something with it in the litigation, which is why  
20 we're here, I presume. Correct?

21 MR. WOLINSKY: It's part of the search for the  
22 truth. Yes. I mean, to the extent --

23 THE COURT: Well, I know it's --

24 MR. WOLINSKY: -- that search for truth is --

25 THE COURT: I know --

1 MR. WOLINSKY: -- tactical, yeah. I would --

2 THE COURT: I know -- I know --

3 MR. WOLINSKY: I'll give you tactical.

4 THE COURT: I know it's a search for the truth and  
5 years ago when I was a young lawyer and I worked for a  
6 senior litigator who was a fellow of the American College of  
7 Trial Lawyers, he used to always tell me that this pursuit  
8 was a search for the truth, and it is at the highest level.

9 But it's also a truth for tactical advantage when  
10 you're representing a client. I assume that's why we're  
11 here.

12 MR. WOLINSKY: Yes.

13 THE COURT: Okay. Why do you actually need this -  
14 - the answer to this definition?

15 MR. WOLINSKY: Because we would like to understand  
16 what Lehman contemporaneously viewed the market value of  
17 these securities to be. If it's something --

18 THE COURT: What you're --

19 MR. WOLINSKY: -- other than what the prize could  
20 be sold at -- what the security could be sold at, we would  
21 like to know that as well for the tactical reason that Your  
22 Honor has put your finger on, because we are going to take  
23 the position, we're going to prove, very nice that you  
24 marked it at 100 cents on the dollar and very nice that you  
25 marked it on the basis of a level 3 analysis. These are

1 largely level 3 securities. I know -- I under -- I'm sure  
2 Your Honor knows that -- what I'm referring to. And this  
3 was based on modeled prices, based on analyses that are  
4 three-step removed from market transactions. And, by the  
5 way, there are no market transactions.

6 And if they make that admission, which I fully  
7 expect in -- if they're being candid they will make, yes, I  
8 have a huge tactical advantage -- tactical -- I have a huge  
9 advantage in the courtroom on facts because the Lehman --  
10 the JPMorgan witnesses will turn around and say, very nice  
11 that you valued the security on the basis of models derived  
12 from securities that are three steps removed from this one.  
13 But it couldn't be sold at those prices. And by the way,  
14 the people in the finance department at Lehman agreed.

15 THE COURT: Now let me ask you something because I  
16 assume that there is no issue as to the integrity of  
17 Schedule A, namely it reflects information taken from Alco  
18 and Free Collateral reports, and that if you go down each of  
19 the date columns, September 11 with a bunch of numbers  
20 listed under it, that is, in fact, information taken from  
21 contemporaneous records at Lehman Brothers Holdings which  
22 indicate how these various investments or assets were  
23 marked.

24 MR. WOLINSKY: Correct.

25 THE COURT: You are looking for something else.

1 You are looking for some acknowledgement in one form or  
2 another that these numbers as listed do not reflect what  
3 these opaque assets would yield if sold in the market at  
4 that time.

5 MR. WOLINSKY: Correct.

6 THE COURT: Isn't that a different question from  
7 the question that started the process, the process of  
8 seeking discovery because the process that you undertook in  
9 pressing for an answer to the interrogatory was, tell me if  
10 there are contemporaneous values at Lehman with respect to  
11 the collateral in question. This is that answer and it  
12 seems to me you just don't like it or you think it's  
13 inadequate or incomplete or insufficient.

14 MR. WOLINSKY: The latter.

15 THE COURT: I think it's probably all those  
16 things.

17 MR. WOLINSKY: No. The marks are the marks.

18 THE COURT: Exactly. Well, since the marks are  
19 the marks, what more can you seek by way of documents?  
20 What more can you seek other than the document that you may  
21 want to see that doesn't exist, a document that might be  
22 Schedule B that would say, Schedule A's numbers are  
23 overstated to the tune of 25 percent, to make something up.

24 MR. WOLINSKY: I doubt that document exists.

25 THE COURT: Of course it doesn't. I just made it

1 up.

2 MR. WOLINSKY: Right.

3 THE COURT: I'm talking about -- I'm talking about  
4 a land of storybook finance in which you have a major  
5 investment banking firm that has marks that reflect assets  
6 at their --

7 MR. WOLINSKY: You're having a hard --

8 THE COURT: -- full value and then -- and then --  
9 and then you're looking for what amounts to a mental  
10 impression that some people had that those numbers were  
11 overstated relative to fair market value.

12 MR. WOLINSKY: No. I'm not saying that they  
13 overstated.

14 THE COURT: You're not?

15 MR. WOLINSKY: No. I'm -- they -- they could be  
16 perfect -- within the counting rules they could be perfectly  
17 legitimate to class -- to list the security on the books and  
18 records at face. But that doesn't mean that they could be  
19 sold at face.

20 THE COURT: Isn't it a question for experts  
21 retained by both Lehman and JPMorgan Chase to take a look at  
22 Schedule A and to say what you just said, because isn't that  
23 what this is about now? You're looking for --

24 MR. WOLINSKY: No.

25 THE COURT: -- something that it seems to me

1       probably does not exist. You're looking for either a  
2       document that says, we have other numbers, or a witness, a  
3       30(b)(6) witness who you can ask questions about and you'll  
4       say, could you sell -- could you sell racers for \$5 billion  
5       on September 11th. I assume you'll ask that question.

6               MR. WOLINSKY: And I assume the answer is going to  
7       be no.

8               THE COURT: Or I don't know.

9               MR. WOLINSKY: Uh-huh. Well, we did ask the  
10       people who were supposed to know and they all said, I don't  
11       know or no. That was before we served the interrogatory  
12       answer -- interrogatory. And now -- see this is what's --  
13       what's -- I don't want to say annoying, but this is why  
14       we're pressing the issue because when we asked the people  
15       who constructed racers, could racers be sold for \$5 billion,  
16       the answer was no. There was no market for racers. The  
17       reason why it's there is because we couldn't sold --  
18       couldn't sell it.

19               THE COURT: Well, this is the actually fascinating  
20       theoretical question.

21               MR. WOLINSKY: There's nothing theoretical about  
22       it.

23               THE COURT: No. This is a fascinating theoretical  
24       question.

25               MR. WOLINSKY: Then I'll -- then I'm happy to

1 engage in it with you.

2 THE COURT: If you have a valuable asset but there  
3 is no market for it, does that mean that that asset has no  
4 value?

5 MR. WOLINSKY: Does that mean it has no collateral  
6 value? That's what the --

7 THE COURT: No.

8 MR. WOLINSKY: -- case is about.

9 THE COURT: Well, of course the case is about  
10 collateral value, but it's also about what all valuation  
11 cases are about. It's about perception and it's about  
12 experts that look at all the data and come up with a made as  
13 instructed opinion. That's what happens. That's what  
14 happens in these cases.

15 MR. WOLINSKY: Yes.

16 THE COURT: Sorry, Hal. I didn't -- I didn't mean  
17 to make you cringe.

18 MR. WOLINSKY: No. No. And that is going to  
19 happen in this case. You made Hal cringe?

20 THE COURT: You didn't have to respond. I just  
21 saw -- I just saw your -- you were -- you looked --

22 MR. NOVIKOFF: Yeah. I --

23 THE COURT: -- pained by my comment.

24 MR. NOVIKOFF: I did because that's not the issue.  
25 It's got to be decided in the context of what the securities

1 were provided for, and that was collateral in a clearance  
2 arrangement, and in that context the theoretical issues,  
3 Your Honor, peel away. The issue is simply, what could they  
4 be sold for if JPMorgan needed to recover its clearing loss.

5 THE COURT: You have already asked, as I  
6 understand from this colloquy, any number of witnesses that  
7 question and they answered the question either it couldn't  
8 be -- I don't know, or it couldn't be sold for that. There  
9 is already, based upon the acknowledgements made during the  
10 course of this argument, an ample record that answers the  
11 question that you are seeking to have answered in a motion  
12 to compel even though you didn't actually seek permission to  
13 press this motion today.

14 So my question is, again, why are we doing this  
15 except for tactical advantage? I am finding this, the more  
16 I discover about it as we're talking, increasingly difficult  
17 to comprehend. And it becomes increasingly, as you used the  
18 term before, annoying.

19 What do you want from me?

20 MR. WOLINSKY: Your Honor --

21 THE COURT: I mean, why do you really want it?  
22 Why do you want to press this now?

23 MR. WOLINSKY: The why is very easy. The way is  
24 because we want to be able to prove that these values were  
25 theoretical constructs that did not represent the prices at

1 which the securities could be sold in the market at the  
2 time.

3 THE COURT: You already know that based upon what  
4 you've told me. You already have ample evidence from Lehman  
5 witnesses that confirm they either don't know or don't think  
6 that you can sell racers for \$5 billion. What more could  
7 you possibly be asking for?

8 MR. WOLINSKY: What more I could be asking for is  
9 this: When they try to put on, through a witness or an  
10 expert, these schedules to say, well, these are the marks  
11 and we -- you are entitled to -- everyone in the world was  
12 entitled to rely on these books and records of Lehman as the  
13 values -- the market value of the security, I would like to  
14 be able to -- to have -- to cross-examine the witness who  
15 puts -- tries to put the Alco and Free Collateral reports  
16 into evidence, or the expert who is relying on them with  
17 factual information about what the numbers on the Alco and  
18 Free Collateral reports represent.

19 So let's step back and see how we got here, Your  
20 Honor. And I -- I -- I don't mean to be trying your  
21 patience. Honestly, I do not. But let's play out how this  
22 is going to go at trial.

23 A witness is going to take the stand and is going  
24 to say here are the free collateral reports. Here are the  
25 Alco reports. They're prepared in the ordinary course of

1 business. We had a -- we had a department at Lehman that  
2 did nothing more than value the securities and the  
3 portfolios on a daily basis. These are the values, and  
4 based on these values, JPMorgan was over collateralized.

5 All I want to do is be able to ask the witness who  
6 puts on that document to testify about that document to say,  
7 okay, those are the market values that were placed on the  
8 securities. Could you please explain to me how they were  
9 derived; what did they represent. And that's a very fair  
10 question to ask the witness who is going to be putting these  
11 documents into evidence at trial. And it's a very fair  
12 question to be asking an expert: Did you know that these --  
13 that the prices that you're relying upon are not based on  
14 market data, are not based on actual trades.

15 THE COURT: But don't you see that wasn't your  
16 original interrogatory. We're -- we're down a different  
17 rabbit hole.

18 MR. WOLINSKY: Your Honor, if you would like us to  
19 start all over, we will.

20 THE COURT: No. I don't want you to waste --

21 MR. WOLINSKY: I didn't think you did.

22 THE COURT: I don't want you to waste time, but  
23 I'm also very transparently concerned that there is a  
24 litigation game being played here and it's been a long  
25 process of discovery. When this case was first commenced, I

1 remember there was an initial pretrial conference and  
2 somebody mentioned that there was a trial date set for, I  
3 think, January of 2012. It's now a year later and the trial  
4 date is a year off still.

5 What disturbs me systemically about this case is  
6 that it's enormously burdensome to the parties. I think  
7 it's burdensome to counsel. And there are times when, since  
8 I don't know it as well as you do, events like this begin to  
9 seem like a form of water torture. I don't understand why  
10 this could not be worked out. I don't understand why, even  
11 though you said at the outset that you wouldn't be here  
12 unless it was demonstrably important, that this is  
13 demonstrably important in a setting in which you have  
14 acknowledged in your argument that countless witnesses have  
15 been asked certain questions about numbers just like this,  
16 just formatted differently.

17 So with that I'm going to take a short break  
18 because I have a 3:15 telephonic chambers conference and I'm  
19 going to be back here in about 15 minutes I figure.

20 I realize it's a break in the middle of colloquy.  
21 Think of it as an example of what happens when lights go out  
22 in the dome.

23 (Laughter)

24 THE COURT: We'll -- I don't think it's going to  
25 effect the momentum. We're just going to have an

1       unscheduled time out.

2               Okay.

3               MR. WOLINSKY:   Thanks.

4               THE COURT:   See you in a bit.

5               (Recess at 3:11 p.m.)

6               THE COURT:   Be seated, please.

7               So I think when last we were talking with each  
8       other I was pressing a little bit as to why we're here, why  
9       we really need to be here.

10              MR. WOLINSKY:   Okay.   Should I pick up?

11              THE COURT:   Sure.

12              MR. WOLINSKY:   Okay.   Your Honor, I did want -- I  
13       went back over the break, just to review how we got to where  
14       we were, and I went -- went back to our original motion.

15              And we did flag in our original motion papers this  
16       very issue.   Among the documents they cited us to in the --  
17       in the original -- in the course of the give and take were  
18       documents that listed these various securities at face, and  
19       then we specifically challenged them in our opening brief,  
20       but nothing in these documents or in LBHI's R&Os specifies  
21       which, if any, of those values LBHI believed to be the  
22       amount that JPMorgan could have realized if it sold the  
23       collateral in 2008.

24              And specifically in the order that we originally  
25       moved for, we asked them to specify the elements of their

1 calculation of over collateralization. So I -- I think it's  
2 fair to say that market value is an element of the  
3 calculation of over collateralization. You have market  
4 value, haircut, collateral value.

5 And that really goes -- picks up on the point that  
6 Mr. Novikoff made before the break, which is that market  
7 value in the context in which we're speaking has a real  
8 meaning. These are securities that in the event of a Lehman  
9 failure were going to have to be sold, not in a theoretical  
10 world, but to real people for real money.

11 So in that respect I think, Your Honor, this  
12 motion -- I -- and I really do appreciate that there's --  
13 we're trying to move this along and starting this whole  
14 sequence over with another letter really wasn't going to be  
15 very productive and that's why we proceeded the way we did  
16 and we think we fairly did.

17 And on the question of whether we're being  
18 tactical here --

19 THE COURT: Sure you are.

20 MR. WOLINSKY: Yes. We're being tactical --

21 THE COURT: Otherwise it wouldn't be --

22 MR. WOLINSKY: -- to advance the interests of our  
23 client to try and get information which we think we're  
24 entitled to.

25 THE COURT: Okay.

1 MR. WOLINSKY: And an evasive answer is tactical,  
2 too.

3 THE COURT: Well, maybe --

4 MR. WOLINSKY: Try --

5 THE COURT: -- maybe it's time to hear what they  
6 have to say.

7 MR. WOLINSKY: I'm happy to relinquish the podium.

8 THE COURT: Fine.

9 MR. PIZZURO: Thank you, Your Honor.

10 I was perhaps more interested than Your Honor to  
11 hear Mr. Wolinsky's summation and also his trial strategy,  
12 but it has very little to do with why we're here today on a  
13 motion to compel an answer to an interrogatory that they've  
14 already received.

15 The issue in the case, it's not what these numbers  
16 reflect, what Lehman thought these securities could be sold  
17 for at a fire sale immediately on the day of or after the  
18 bankruptcy. The issue is what JPMorgan thought these were  
19 worth. When JPMorgan was acting as a tri-party repo agent  
20 repoing these to the street for many months before the  
21 bankruptcy repoing them to the tri-party agent after the  
22 bankruptcy using these values, and I'm sure that the people  
23 who were financing these before and after the bankruptcy,  
24 including federal reserve bank, would be very interested to  
25 know that JPMorgan apparently had no idea what these were

1       worth in terms of collateral.

2               So Mr. Wolinsky isn't going to get his wish of  
3       being able to cross-examine a witness that is going to be  
4       relying on these documents and Lehman's numbers. He's going  
5       to be faced with cross-examining his own people who have to  
6       answer the question of why did they believe they were over  
7       collateralized; why did they represent these values to the  
8       fed and to the street for so long before and after the  
9       bankruptcy; and how can they now be complaining that they  
10      were taken advantage of by Lehman.

11              But to get this case back to what we're supposed  
12      to be discussing today, I think if Your Honor hears the  
13      whole story, which we didn't hear, and I'm going to give Mr.  
14      Wolinsky a little bit -- a little bit of a pass of this  
15      personally because I don't think he was involved.

16              The history of this is true up to a point the way  
17      it was recounted by Mr. Wolinsky. What was left out was  
18      that after the last time we were before Your Honor, which I  
19      believe was the Tuesday after Thanksgiving, we had a  
20      discussion of this and some other issues. And the parties  
21      did make another attempt to have a stipulation that would  
22      resolve this issue. We were unsuccessful. We filed our  
23      reply brief on December 14 and were ready to come into court  
24      and argue this. Counsel needed a postponement because of a  
25      scheduling conflict. That's fine.

1 But in lieu of that postponement, yet again, we  
2 had some more discussions in -- in an effort to resolve  
3 this. And if Your Honor cares to see them, I have the email  
4 traffic here where we had a proposal from Wachtell and  
5 Wachtell proposed a stipulation with an overage that they  
6 said would resolve this entire dispute.

7 Would Your Honor --

8 THE COURT: Yes. I would be interested in seeing  
9 it.

10 MR. PIZZURO: So the first page, Your Honor, is  
11 the proposal from Wachtell and what we've highlighted here  
12 are the words that we had a problem with. And so we  
13 responded and we said, we'll give you exactly what you've  
14 asked for, word for word verbatim, exactly what you've asked  
15 for. We would like your "should" in the first paragraph to  
16 be a "would" and we would like your "marks" to be "pricing,"  
17 and those are the only two changes that we would propose.  
18 And we were told, not good enough. You have to take it  
19 verbatim or nothing.

20 And we were faced with that. Based on the  
21 assumption that we certainly couldn't get Wachtell or JPM to  
22 enter into a stipulation that they opposed, we similarly  
23 didn't think that they could move to compel us to give them  
24 an interrogatory answer different from what we proposed.  
25 And so the interrogatory answer is basically verbatim what

1 they asked for in the stip with those two changes.

2 And the Schedule A was appended. The Schedule A  
3 provides the information that they asked for listed down  
4 after this paragraph 3 and then the Bates numbers that they  
5 -- and they asked us to refer to these documents. That's  
6 where these numbers come from. That's where Schedule A  
7 comes from.

8 So they got the representations that they asked  
9 for verbatim. They got the information that they asked for  
10 verbatim. They got it exactly from the documents that they  
11 asked us to -- to curl the information from, and these were  
12 documents that they had in hand. And when we provided them  
13 with that they said, for the first time, it's not good  
14 enough and we want a 30(b)(6) witness who is going to  
15 explain to us some of the information which is contained in  
16 these documents and the schedule.

17 And we did not tell them no. What we said to them  
18 and what is the case today is we don't know whether we have  
19 access to individuals who actually could answer the  
20 questions that you put in your 30(b)(6) notice, which we got  
21 on January 9. We're trying to track those folks down.  
22 They're in the wind. They're no longer with the estate.  
23 They don't work at A&M. Some of them are I don't know  
24 where, but we're making a good faith effort to see whether  
25 or not we can actually comply with a 30(b)(6) request, and

1 that is an ongoing process.

2 THE COURT: Let me ask --

3 MR. PIZZURO: That's --

4 THE COURT: -- you this. Assuming you are able to  
5 identify an individual who is in a position to submit to a  
6 30(b)(6) inquiry, you're willing to do that and you've  
7 offered that to Wachtell?

8 MR. PIZZURO: We're willing to offer a 30(b)(6)  
9 witness. I'm not sure -- and I want to be clear about one  
10 thing. The 30(b)(6) notice contains the questions or the  
11 areas of questioning that are the second part of the  
12 proposed order. They don't have the questions that Mr.  
13 Wolinsky was posing about, is this the market value; is this  
14 what you thought it could be sold for in the market.

15 Those questions were never asked ever. The first  
16 time we've ever seen those questions was Friday afternoon,  
17 7:00, when we got the proposed order together with their  
18 reply brief. So the 30(b)(6) notice is a different animal  
19 from the questions that they are asking us now to be  
20 compelled to answer.

21 THE COURT: But let me understand something  
22 because I have no visibility into the discovery process that  
23 you've all been engaged in for such a long time.

24 Are there Lehman witnesses that have been deposed  
25 -- it doesn't really matter how many, just some number of

1 individuals, former Lehman employees -- who have been asked  
2 about these values and have been asked whether or not, for  
3 example, racers can -- could have been sold on September 11,  
4 2008 for \$5 billion? Were people asked questions like that?

5 MR. PIZZURO: The first time I -- I -- personally,  
6 Your Honor, I don't know. The first time that I heard that  
7 representation was when Mr. Wolinsky made it. He might be  
8 right. Frankly, I don't know so I can't verify that and I  
9 can't deny it.

10 That -- that's the way I would have to answer that  
11 question.

12 THE COURT: Okay. If I'm understanding what  
13 you've just said correctly, I'm not sure why we're having  
14 this argument because you've turned over Schedule A. You've  
15 answered the interrogatory, and you've indicated a  
16 willingness -- you haven't committed to do it. You've  
17 indicated a willingness to locate a witness who can respond  
18 to the areas of inquiry outlined in a 30(b)(6) notice,  
19 correct?

20 MR. PIZZURO: That's correct, Your Honor.

21 THE COURT: So what do you think I'm being asked  
22 to compel you to do?

23 MR. PIZZURO: I have not got a clue, Your Honor,  
24 other than what's contained in the proposed order, which is  
25 a whole different set of questions from any questions we

1 have been asked before. I -- Your Honor, I -- I can't  
2 answer the question or I can't make the argument any better  
3 than the questions that Your Honor was putting to Mr.  
4 Wolinsky where, frankly, I thought that you would --  
5 somebody had gotten a hold of my notepad for the argument.

6 This is clearly not based on any need to get  
7 discovery that's responsive to the interrogatory question  
8 that they've proposed. This is an attempt to have the  
9 merits argued, to have some sort of tactical advantage. Mr.  
10 Wolinsky was up here. As I said, he gave his summation.  
11 It's okay. It's -- it's nothing that we didn't expect to  
12 hear.

13 And it's simply taking an opportunity to make what  
14 they believe are their merits-based arguments, and if  
15 they're trying to back Lehman into a corner to have somebody  
16 make a statement which then will be said to be an admission  
17 that we'll see on a 30(b) -- rather a 56 -- 56 statement or  
18 summary judgment, you know, I think that's clearly what --  
19 what they're looking for.

20 But what they have received is what they're  
21 entitled to. They've gotten all the information.  
22 Everything more is, as Your Honor said, a matter of expert  
23 testimony. They're going to know and we've -- we've made  
24 this clear. We've made it clear from the first time we were  
25 in front of Your Honor. We don't have any documents that

1 they don't have. Our experts haven't seen any documents,  
2 aren't relying on any documents that they don't have that  
3 they're going to be surprised about. There isn't any  
4 attempt to have trial by ambush or expert by ambush or  
5 anything else. Everything is transparent.

6 And the rest of the argument here is really  
7 merits. If they're not satisfied, if they think that the  
8 information with which they're provided isn't sufficient to  
9 sustain the claim, that's the basis for a motion. Be at it.  
10 It will be decided. But it -- this is not the appropriate  
11 context for that kind of a dispute.

12 We shouldn't be here today, Your Honor. You're  
13 absolutely correct. And if there is any further discovery  
14 dispute, if they -- if we can't find somebody, or if we were  
15 to have refused to provide the 30(b)(6), what they should  
16 have done is they should have made a motion to compel or  
17 sought permission for a motion to compel us to provide a  
18 30(b)(6) witness.

19 But this interrogatory dispute is long gone. They  
20 told us what they wanted. We gave them it verbatim, and yet  
21 we're here this afternoon still arguing about this. And I  
22 don't know the answer, Your Honor, as to why we're here. We  
23 shouldn't be here.

24 THE COURT: Well, okay. Here's my immediate  
25 reaction to this back and forth.

1           It seems to me that the interrogatory that was the  
2           subject of the original motion to compel has been answered.  
3           The inquiry that is currently animating this argument may be  
4           subsumed within the original request, but I actually don't  
5           think it is. I think it is, in effect, a -- a rip on the  
6           original request to move in a slightly different direction,  
7           even though the interrogatory has been answered.

8           Since discovery has not concluded, there's no  
9           reason that the parties can't continue to pursue their  
10          discovery rights until your stipulated period for fact  
11          discovery has run its course. And can you refresh my  
12          recollection as to what that date is? It has been extended  
13          repeatedly.

14          MR. MOSCATO: I think it's April 5.

15          MR. PIZZURO: April 5.

16          MR. WOLINSKY: Yes. April 5.

17          THE COURT: Okay. So you have a couple of months,  
18          well, seven weeks to complete discovery.

19          As far as I'm concerned, I'm denying this motion  
20          to compel in its present form without prejudice. My  
21          understanding from counsel is that a 30(b)(6) witness which  
22          is part of this inquiry is being identified. Whether that  
23          witness is ever actually identified remains to be seen.  
24          Whether that witness ever actually testifies remains to be  
25          seen. Whether any further motion practice evolves as a

1 result of this search for the truth remains to be seen.

2 And I think that for now, at least, I'll entertain  
3 an agreed simple order that I can enter on the docket that  
4 resolves this for today. But I'm not granting any further  
5 relief today. Parties should simply work at this  
6 themselves.

7 And I think what I would like to do is conclude  
8 the hearing and then when we're off the record come back and  
9 have maybe a ten-minute conference with everybody, just so I  
10 have a better understanding as to what's going to happen  
11 next. Consider it a discovery management conference.

12 Okay. We're adjourned and I'll come back in five  
13 minutes.

14 MR. WOLINSKY: Thank you, Your Honor.

15 (Whereupon, these proceedings concluded at 3:49 p.m.)  
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I N D E X

RULINGS

Page Line

Debtors' Sixty-Seventh Omnibus Objection

to Claims (Value Derivative Claims) 33 3

Debtors' Eighty-Fourth Omnibus Objection

to Claims (Value Derivative Claims) 33 3

Two Hundred Eighty-Second Omnibus Objection

to Claims (Late Filed Claims) 33 24

Joint Motion of Lehman Brothers Holdings

Inc. and Litigation Subcommittee of

Creditors' Committee to Extent Stay to

Avoidance Actions and Grant Certain Related

Relief 51 19

One Hundred Forty-Third Omnibus Objection

to Claims (Late-Filed Claims) 114 1

LBHI v. JPMorgan Chase Bank, N.A.

[Adversary Proceeding No. 10-03266] Motion

to Compel Answer to Interrogatory and

1     Motion Authorizing the Filing of an  
2     Unredacted Version of the Motion to  
3     Compel

185

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C E R T I F I C A T I O N

I, Dawn South, Nicole Yawn, Sherri Breach and Jamie  
Gallagher, certify that the foregoing transcript is a true  
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Date: February 14, 2013